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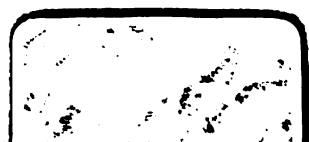
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REPORTS OF CASES.





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# REPORTS OF CASES

ARGUED AND ADJUDGED IN THE  
*W. B. R.* COURT OF KING'S BENCH,  
IN THE SEVENTH, EIGHTH, NINTH, AND TENTH YEARS  
OF KING GEORGE THE SECOND.

DURING WHICH TIME THE RIGHT HONOURABLE  
THE EARL OF HARDWICKE  
WAS LORD CHIEF JUSTICE OF THAT COURT.

BY T. CUNNINGHAM.

*The Third Edition, revised and corrected by*  
THOMAS TOWNSEND BUCKNILL,  
*of the Inner Temple, Barrister at Law.*



LONDON:  
STEVENS AND HAYNES,  
BELL YARD, TEMPLE BAR.  
1871.





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THE SECOND EDITION, CORRECTED.

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BY T. CUNNINGHAM, Esq.

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## ADVERTISEMENT.

**T**HE following cases were taken by a gentleman of considerable business at the bar of the *King's Bench*, during the time that lord *Hardwicke* presided in that court. They have been perused and approved by some persons eminent in the law; by whose advice, and under whose inspection, the editor has committed them to the press.

Some of the cases in this collection are already in print, in the reports of *Sir John Strange*; but ours have the advantage of these in this respect, that they are *fuller and more circumstantial*, both in the state of the facts, and in the arguments of the bar and bench; for it has been laid down lately by a very great authority, *that he is the BEST reporter, who relates the GREATEST number of the circumstances of a case, and the reasons of the judges, MOST at large*. And indeed, by too earnest a desire to be concise, the reporter often becomes obscure: an error of the *worst* kind, and which is here carefully avoided.

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Wilkinson v. Lutwidge . . . . .	137	229
Wilmot v. Allen . . . . .	160	268
Wiscot's case . . . . .	4	6
Wooden v. Worden . . . . .	48	82



## A PROPOSAL FOR RENDERING THE LAWS OF ENGLAND CLEAR AND CERTAIN.

*CERTAINTY is so essential to a law, that a law without it cannot be just. For if the trumpet gives an uncertain sound, who shall prepare himself to the battle? So if the law has an uncertain sense, who shall obey it? A law, therefore, ought to give warning before it strikes: and it is a true maxim, that the best law leaves least to the breast of the judge; which is effected by CERTAINTY.*

LORD BACON.

It is an abuse that the laws and customs of the realm, with their *occasions*, are not put into writing, whereby they might be known by all men.

MIRROR OF JUSTICES.

**N**OTHING conduces more to the peace and prosperity of a nation, than good laws, and the due execution of them. These give life to a state, and are the bulwark, fence, and security of men's lives and fortunes. It is the happiness and glory of a kingdom, *that judgment should run down as water, and righteousness as a mighty stream; that judges should attend more to the merits of the cause before them, than to the quality of the persons interested; and that justice may be duly administered, without* Amos 5. 24.

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C. 29.

having its current stopped by corruption, fear of man, or respect of persons, agreeable to the golden rule of *Magna Charta*, *nulli negabimus, nulli vendemus, nulli differemus justitiam*. To the end, therefore, that those in whose hands the balance of civil justice is put, may hold and manage it skilfully, steadily, equally, and uniformly; and people may be [ii] satisfied that their causes are not determined by humour, caprice, or partiality; great care hath been taken, in all nations, to preserve and publish, from time to time, the most remarkable judgments and resolutions of the higher judges; to serve not only for a directory in the like cases to themselves, according to the rule, *ubi eadem ratio, ibi idem jus*; and to lawyers who have occasion to plead before them, but also as a pattern to judges who act in a lower sphere, under the control and correction of the superior courts, to copy after in their proceedings, and lead them in the paths of judgment.

Prov. 8. 20.

Lib. 7. c. 27.

The Romans, whom God, according to Zonaras, made choice of to give the world a sample of his justice, and whose laws are received all over Europe, where they are not contrary to the municipal laws and customs of each country, had, in the beginning, but very few laws, which were engraved in twelve tables of brass, and consisted of the chief maxims of government, selected out of the Grecian laws, the laws of Rome under the kings, and the customs of the place, having in them, as Cicero says, every thing useful and good in the books of the philosophers.

Lib. de Orat.

- The first interpreters of the Roman law, were the senators and nobles, whom Romulus enjoined to give advice to their clients, that is, to such as were put under their protection. The Plebeians sheltered themselves under some powerful senator, who was

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obliged to assist them with his advice in the management of their affairs, explain the law, and do them all manner of good offices.

The right of interpreting the laws was afterwards vested in the *College of Pontiffs*, when the *Romans* thought proper to mix law with religious ceremonies. All those, however, whose particular application and abilities had rendered them knowing in the law, undertook to resolve such doubts as were brought to them ; but their answers were of no great weight in the time of the republic, nor even under *Augustus*, though he allowed them to give their opinions publicly.

*Publius Papirius* was the first *Roman* who applied himself seriously to the study of the law : he made a collection of the regal laws in the reign of *Tarquin the Proud*.

*Appius Claudius* was employed in digesting the law of the twelve tables, which was not finished until the year 304, after the foundation of *Rome*, or 446, before the Christian æra.

*Sextus Ælius*, about the year of *Rome* 545, (A. C. 205.) composed a book of the elements of the law, intitled *Tripartita* ; because it consisted of the law of the twelve tables, the interpretations of the lawyers, and cases of law.

*Marcus Manilius* was a very great lawyer. “ If any one should ask me,” says *Cicero*, “ who deserved the name of a lawyer, I would answer, ’twas that man who had a perfect knowledge of the laws and customs of the place where he professes it, and knew [iii] how to put it in practice ; and if I must produce examples, I would name *Sextus Ælius*, *Marcus Manilius*, &c.”

Lib. de claris  
Oratoribus.

*Quintus Mucius Scævola* son of *Publius*, was a very

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Lib. de claris  
Oratoribus.

great lawyer, tribune of the people, consul and pontifex Maximus. He had the art of expressing a great deal in a few words, and was always a close reasoner. He was master of a pure and florid style, and his thoughts were sublime and solid. "He was," according to *Cicero*, "the most eloquent amongst the lawyers, and the best lawyer amongst the men of eloquence."

*Caius*, one of the most celebrated lawyers that *Rome* ever bred, wrote many books which contributed to compose the digest. He flourished under the emperors *Antoninus Pius*, and *Marcus Aurelius*.

*Papinian* was master of requests, treasurer, and captain of the guards to the emperor *Septimius Severus*, by whom he was highly esteemed. He was called the *Asylum of Right, and Treasure of the Laws*; and was esteemed the most ingenious and learned of all the fraternity.

Dio. Cassius in  
Vita Severi.

Under the emperor *Septimius Severus*, *Papinian*, assisted by the celebrated civilians *Paulus* and *Ulpian*, sat as præfectus prætorio, or chief justice, at *York*, which was the most eminent station in the empire. And in the code, we have a rescript or decree, made at *York*, in the name of the emperor and his son *Antoninus*.

Lib. 3. Tit. 32.  
C. 1.

After *Caracalla* had murdered his brother, he would fain have persuaded *Papinian* to justify the deed; but he answered, it was much easier to commit fratricide than to justify it. This drew upon him the emperor's resentment, who ordered him to be beheaded. *Cujacius* says, "there never was so great a lawyer before, nor ever will be after him."

Epis. Ded. to the  
Theod. Code.

Though there were many other lawyers of extraordinary merit and reputation, among the *Romans*, we shall mention only the celebrated *Tribonian*, who

was particularly commissioned, by the emperor *Justinian*, to reduce all their writings into order. He was accounted the brightest, and most skilful, lawyer of his time, and to have an universal knowledge of all sciences. His great parts quickly raised him to the highest preferments, and procured him the esteem and confidence of *Justinian*. It was by his advice, the emperor undertook the abridgment of the civil law, which, till then, lay dispersed in an infinite number of books. And the emperor's success in that great undertaking was entirely owing to his care and labour.

Before *Justinian's* time, there was no authentic collection of the *Answers* and other writings of the lawyers; which lay scattered in above two thousand volumes, and the contradictions in them were alone sufficient to render the reading of them utterly useless.

To remedy these inconveniences, and facilitate the knowledge of the laws, *Justinian*, in the year 528, signified his pleasure to *Tribonian*, and other famous [iv] lawyers, to make a general compilation of the best and most useful constitutions of the emperors his predecessors, and all his own to that time. This collection is called the *Code*. \*

He likewise formed a project of collecting the best of the writings of the lawyers; and by that means making a compleat body of the civil law; to which alone recourse might be had, without the trouble of consulting all those other volumes which had introduced so much confusion. This excellent compilation

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\* *Codex* properly signifies a book in sheets, which comes from a custom among the antients, of writing upon the bark of trees, before the invention of paper. This name was given, by way of excellence, to the imperial constitutions.



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was begun by *Tribonian*, and sixteen other able lawyers, in the year 530, and finished the sixteenth of *December*, 533, and was called the *Digest*, or *Pandects*.\*

While the digest was composing, the emperor laid his commands upon *Tribonian*, *Theophilus*, and *Dorotheus*, to make an abridgement of the first principles of the law, for the benefit of young students, who should apply themselves to that science. These three persons were so diligent, that in the year 533, this collection was published under the title of *Institutes*.

In the year 534, there was a second edition of the *Code* published, with alterations and additions, and called *Codex Repetitæ Prælectionis*; that is, *the Code revised, corrected and augmented*.

During *Justinian's* life, the body of the civil law consisted only of three parts, the *Institutes*, *Digests*, and *Code*; but after his death, the fourth part was composed out of his *Constitutions*, and called *Novels*.† These form the fourth and last part of the civil law.

This valuable treasure of antiquity, contains the refined precepts of the law of nature and nations, as well as all the principles of morality. It has been received by all nations, even by the *Turks*, who, notwithstanding the antipathy they have to any thing of Christian growth, have translated the *Roman* law into their own language, and follow its decisions in matters to which the *Alcoran* cannot be applied. It is in this treasure we may find the most perfect collection

Monfr. Fer-  
riere's history of  
the civil war.

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\* *Digest*, from *Digero*, is a methodical collection; and *Pandects*, from *pan*, *omne*, and *ectenai*, *complector*, is a comprehensive collection.

† *Quasi constitutiones et post codicem Justiniani repetitæ prælectionis promulgatæ*. Cujacius.

of natural reason and equity, applied to all the transactions and intercourses between man and man. It is a master-piece of wisdom, honesty, politics, prudence, justice, and equity.

These collections of the *Roman* lawyers, and the determinations of the imperial chamber, the *rotæ* of *Rome*, *Genoa*, and other sovereign courts in *Spain*, *Portugal*, *Italy*, *Germany*, *Holland*, and *Flanders*, committed to writing by learned men (many of whom were employed by the supreme powers in their respective countries) are lasting monuments of the great abilities of judges and lawyers, and sufficiently shew that *nondum astrea terras reliquit*.

In *France*, monsr. *Louet*, monf. *Le Pêtre* the authors of *le Journal du Palais*,\* and *le Journal des Audiences*, and others, have collected the judgments and sentences of the parliament and sovereign judicatures there; which monsr. *De la Ville* compiled, in the year 1692, into a *Dictionnaire des arrêts*, that was continued afterwards, and greatly improved, by monsr. *Pierre Jaques Brillou*.

In *Scotland*, king *James V.* who instituted the Court of Session, ordered one of the lords to keep a journal of the decisions: which province many have performed different ways. Some † have made promiscuous collections of decisions, statutes, and customs. Others have observed only the decisions of their own time (some of which are digested under alpha-

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\* This journal was begun in the year 1672, by *G. Blondeau*, and by *G. Gueret*, advocates in the parliament of *Paris*. It consists of the judgments and sentiments of several courts in the different provinces, where the *French* parliaments sat.

† As *Sir James Balfour*, *Sir William Oliphant*, *Sir Robert Spotswood*, and *Sir Thomas Hope*.

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betical heads of law)\* and others have committed them to writing according to the order of time they were pronounced.†

Many of these collections were not printed until Mr. *Home* published them in the year 1741, in the form of a dictionary, which contains all the decisions of the court of session, from the year 1540, to 1691.

Decisions from  
1716 to 1728.

They are still continued to be taken by a proper person, called the *Collector of the Decisions*, to whom the dean and faculty of advocates there pay a yearly salary; and we find that even the president of the court of session has sometimes condescended to inspect those compilations; for Mr. *Home* tells us, that gratitude obliged him to acknowledge the assistance he had from a certain great man in his undertaking. "When I mention the president of the session," says he, "to be the man, and that he has found leisure to look into the work, the world will not be surprised; when they reflect upon that benevolence of temper and affability, that fondness to protect and encourage whatever has the shew of rising merit; virtues interwoven in his nature, and exerting themselves in all his actions," &c.

But to come to our own country. It is probable that the professors of the law began to collect cases very early; for though our reports at large, which are published, begin with *Edward III.* and the broken cases of elder times, which are scattered in the abridgements, are not found higher than the time of [vi]

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\* Sir *Thomas Nicholson*, Sir *George Auchinlec*, and Sir *George Lockhart*.

† As the Author of *Sinclair's Practices*, Sir *Richard Maitland*, *Thomas earl of Haddington*, Sir *Andrew Gibson*, Sir *John Gilmour*, *James viscount of Stair*, Sir *John Baird*, Sir *John Nisbet*, Sir *Peter Wedderburn*, Sir *David Falconer*, Sir *Roger Hog*, Sir *Patrick Lyon*, and Sir *John Lauder*.

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Henry III. yet certainly there were other reports digested into years and terms, as antient as king *William the Conqueror*, as appears by what *Chaucer* writes of the serjeant at law ;

*In terms had he cases and doom's all  
That fro' the time of K. W. were fall.*

A long time after the courts of justice were settled at *Westminster-Hall*, we find no regular collection of printed cases, judiciously argued and adjudged there. The oldest collection of reports we have, is that which was originally compiled, Mr. *Selden* says, by *Richard de Winchedom*, who lived in the reign of *Edward II.* when the cases here reported were adjudged. These reports were solemnly recommended to the press by that great oracle of the law, the lord chief justice *Hale*, upon occasion of the authorities cited out of them in *Sacheverell* and *Frogatt's* case, and were published by Sir *John Maynard*, serjeant at law, with the approbation of the Chancellor and all the judges.

*Mich. 23 Car. 2.  
2 Saund. 361.*

The reports of adjudged cases, which *Braeton* calls, *the Judgments of the Just*, were esteemed so beneficial to the public, that some of our kings took care to transmit them to posterity ; and for that purpose *Edward III.* and several of his successors in their respective reigns, appointed four able and industrious men, probably chosen out of the inns of court, to report the judicial decisions in the superior courts of justice ; that those judgments which were given there, might be established by time and usage ; that similar cases might receive uniform and certain determinations ; and that all the judges and justices in all the several parts of the realm might, as it were, with one mouth, in all men's actions, pronounce one and the same sentence.

3 Rep.

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The reporters, thus appointed by the state, had fixed salaries from the government as a proper reward for their labours, which have been long since published in several volumes, called the *Year Books and Terms or Annals of the Law*, and contained the arguments of the counsel at the bar, and the resolutions of the judges on the bench, from first *Edward III.* to twelfth *Henry VIII.*\* being near two hundred years. After which time this method was discontinued. It is very remarkable that there are no memorials extant, who those reporters were, not so much as the initial letters of their names; but lord *Coke* extols their diligence, and metaphorically tells us, that if it had not been for their writings, the judgments of so many sages of the law had, with their bodies, been worn away with the worm of Oblivion.

1 Rep.

1599.  
*Plowden.*

The next reporter in order of time, was Mr. *Plowden*, of the *Middle-Temple*, who collected two volumes of cases from 2 *Edw.* 6. to 22 *Eliz.* for his private use; but having lent his manuscript to some lawyers, whose clerks sat up whole nights to transcribe it, designing it for the press; he therefore resolved to publish them himself, and has assured us that all the pleadings are on special verdicts or demurrers; that he had the copies of the records, previously studied the cases, and was prepared to argue them in case of necessity.

[vii]

† About two years afterwards, the nephews and executors of Sir *James Dyer*, chief justice of the Court of Common Pleas, published his reports; which were

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\* The *Year Books* were continued up to the 27th *Hen.* VIII. inclusive.

† According to *Bridgman's Legal Bibliography*, the first edition of *Plowden's Reports* appeared in A.D. 1571, and the first edition of *Dyer's Reports* in A.D. 1585.

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composed of very short notes; the business of his office not permitting the author to enlarge and correct them. But lord *Coke* says, they are less painful, but not less profitable than more elaborate works.

About the same time Sir *John Coke*, having got <sup>1601.</sup> Mr. *Keilway's* manuscript of law cases, committed so many of them to the press as he thought were proper to be published, and told his reader, that there he might find *Multa acutè, multa subtilitè disputata et summo cum judicio determinata; quas alibi non leguntur*; which is true, many of these cases having been argued and adjudged in the reign of *Hen. 7.* and *8.* which are not printed in any of the former reports.

In the same year, lord Ch. Just. *Coke*, having for <sup>1 Rep.</sup> twenty years before observed the true reasons of such matters in law wherein he was of counsel, and which were adjudged upon great and mature deliberation, published the first volume of his reports, and afterwards consented to the printing ten volumes more, which were nineteen years in publishing. But, notwithstanding the character of this great judge, his works were censured even in his life-time; for being removed from the seat of chief justice of *England*, in *Mich. Term*, 14 *Jac. 1.* on account of a controversy that happened between him and the lord chancellor *Egerton*, a commission was granted to Sir *Henry Montague*, his immediate successor in that place, to review his reports, some part whereof he tells us himself, "were written in the tempest of business, and therefore could not polish them as he desired." He is charged with publishing his own arguments as the resolutions of the court.

There was no report published for the space of twenty-two years after lord *Coke's* last volume, though, he tells us, "there was a flourishing spring of learning at that time." And therefore he en-

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couraged the lawyers of that age to follow his example, "and register in books the sayings and doings which were in their time worthy of note and observation." But none would undertake it except Sir *Henry Hobart*, his immediate successor in the Common Pleas, who collected a volume of cases adjudged in that court, but did not think fit to publish them in his life-time.

Soon after the death of *Charles I.* there came forth a flying squadron of reports, of which Mr. *March* led the van; but the best of that number were said to be the cases collected by Just. *Croke*, and published by his son-in-law, Sir *Harbottle Grimstone*, during the usurpation; in which time there were twenty-one reports\* published in the names of judges, serjeants at law, prothonotaries, and other lawyers of less character; inasmuch that Mr. *Bulstrode*, who was the first lawyer after lord *Coke*, that published a report in his life-time, complained of those flying reports, which he compared to the soldiers of *Cadmus*, daily rising and jostling each other; and yet there were very plausible pretenses urged at that time for the publishing all these volumes; some from the manuscripts of judicious persons; others from the copies taken out of the libraries of eminent judges or

* <i>March</i>	1648.	<i>Lane,</i>	}	1657.
<i>Cro. Car.</i>	}	<i>Hetley,</i>		
<i>Broun.</i>		1651.	1 <i>Bulfr.</i>	}
<i>Godbolt,</i>	1652.	2 <i>Cro.</i>		
<i>Goldfb.<sup>1</sup></i>	1653.	2 <i>Bulfr.</i>	}	1659.
<i>Pop.</i>	}	<i>Style,</i>		
<i>Hutt,</i>		1656.	1 <i>Leon.</i> 2 <i>Leon.</i>	
<i>Owen,</i>	}	<i>Ley,</i>		
<i>Noy,</i>		}	<i>Bridgeman,<sup>2</sup></i>	}
<i>Winch,</i>	1657.		3 <i>Bulfr.</i>	

<sup>1</sup> The first edition was published in A.D. 1653, according to *Bridgman's Legal Bibliography*.

<sup>2</sup> The first edition was published in A.D. 1651, according to *Bridgman*.

serjeants at law, where they had been a long time kept for their private use; but fallen then into the hands of public spirited men, who were more communicative, they, either out of zeal for the common good, were willing, or by importunities were prevailed on to transmit them to posterity.

Soon after the restoration of *Charles II.* a check was given to further publications, by a statute prohibiting all law books to be printed without the licence of the lord chancellor or keeper, the chief justice of each court, the chief baron, or one or more of them, or of one by their appointment; which act expired in the reign of king *William.*

In conformity to this law most of the reports\* which were printed whilst it was in being, were licensed by the chancellor and judges; but the first part of lord *Anderson's* reports, and the first *Mod.* had not that advantage.

In the reign of *James II.* some reports† appeared, which were approved in a very unusual manner, a year after the books themselves were published, with the bare allowance only of the judges, without certifying (as is common in such cases) the great judgment, learning, and wisdom, of the author.

[ix] After the revolution, and during the reigns of

* <i>Yelver.</i>	}	1661.	<i>Vaugh,</i>	1677.
<i>Cro. Eliz.</i>			<i>Palmer,</i>	1678.
<i>Bendl.</i>			1 <i>Mod.</i>	1682.
<i>Latch.</i>		1663.	1 <i>Sid.</i>	} 1683.
<i>Moore,</i>		1663.	<i>Litt.</i>	
1 <i>And.</i>		1664.		
2 <i>And.</i>		1665.	† 2 <i>Sid.</i>	1684.
<i>Jones,</i>		1675.	<i>Keele,</i>	1685.
1 <i>Roll,</i>	}	1675.	<i>Saund.</i> 2 Vols.	1686.
3 <i>Leon.</i>			<i>Aleyn,</i>	1688.
2 <i>Roll,</i>			<i>Carter,</i>	1688.



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- king *William*, queen *Anne*, king *George I.* and his late majesty, many reports\* have been published, most of which "set open the windows of the law to let in the gladsome light, whereby the reason thereof may be clearly discerned:" and tho' "some of them, as justice *Shelley* said, might be compared to *Banbury* cheeses, whose superfluities being pared away, there would not be enough left to bait what lord 3 Rep. *Hale* called *the Mousetrap of the Law*; yet probably the meanest of them may, like the little birds, add something towards building the eagle's nest."

It is remarkable, that all the reports published since the year books (except very few) were ushered into the world, as it were by mere accident. When the notes and cases taken by judges, lawyers, &c. became, on their deaths, no longer useful to them,

* <i>Hard.</i>	1693.	Preced. in Chancery,	1733.
<i>Jones,</i>	1695.	Reports in Chancery,	1736.
<i>Vent.</i> 2 Vols.	1696.	<i>Lucas</i> or 10th Mod.	1736.
Cases in Chancery,	1697.	C. in K. W. and Q. A. 2 v.	1737.
2 Mod.	1698.	<i>Holt's</i> Determination,	1738.
3 Mod.	1700.	<i>P. Williams</i> , 2 vols.	1740.
<i>Levin.</i>	1702.	<i>Kelynge's</i> Reports,	1740.
4 Mod.	1703.	Select Cases in Chancery,	1740.
<i>Lutw.</i> 2 Vols.	1704.	<i>Barnardiston</i> ,	1741.
1 <i>Show.</i>	1708.	<i>Freeman.</i>	1742.
5 Mod.	1711.	Cases Sett. and Rem.	1742.
6 Mod.	1713.	<i>Gilbert</i> ,	1742.
<i>Farresley</i> , or 7 Mod.	1715.	<i>Raym.</i> 3 Vols.	1743.
1st and 2d <i>Salk.</i>	1717.	<i>Moseley</i> ,	1744.
<i>Nelson</i> ,	1717.	<i>Comyns</i> ,	1744.
2 <i>Show</i> ,	1720.	Reports in Com. Pleas,	1747.
<i>Comberbach</i> ,	1724.	<i>Fortescue</i> ,	1748.
<i>Fern.</i> 2 Vols.	1726.	3 <i>Williams</i> ,	1749.
<i>Skinner</i> ,	1728.	<i>Barnes</i> ,	1754.
<i>Cartersw.</i>	1728.	<i>Andrews</i> ,	1754.
8 and 9 Mod.	1730.	<i>Strange</i> , 2 Vols.	1755.
<i>Fitzgibb.</i>	1732.	<i>Bunbury</i> ,	1755.

their representatives sold them to booksellers, who having nothing else in view but mere lucre, lumped together all that they could meet with in order to encrease the bulk, and consequently the price ; and as the collectors of these cases had no intention of publishing, at the time of compiling them, so it is impossible that they should be sufficiently correct and accurate : such of them as were taken by lawyers were designed only for their own private use, and could not probably be so intelligible to others ; and those that were taken by the learned judges, are not so copious as were to be wished ; nor is this to be wondered at, because their lordships cannot be supposed to be able to spare time enough from the duty of their office, to enlarge, correct, and polish their notes ; besides that they determine a great many cases *instante* ; whereof they keep no minutes at all.

[x] It would be an infinite task, after this historical account of our reports, to attempt, and, indeed, we do not think ourselves able, to point out all their errors and mistakes. The only way to discover them, as well as to prevent their multiplying, is, we think, by the method we shall hereafter propose.

They are thought, by some gentlemen, already too voluminous. But what would they have said if they had looked into the *Codes*, the *Pandects*, the *Institutes*, the *Novels*, and a vast number of glosses, and explanations of the civil law, not only by the old commentators, but by *Paul de Castro*, *Budeus*, *Alciat*, *Du Moulin*, *Hotoman*, *Cujacius*, *Dion. Gothofredus*, and many more of the last century ? And if these gentlemen reckon about one hundred and ten volumes of the law reports to be too great a number, though they have been above four hundred years in collecting, surely they would have been

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amazed at the *Gregorian, Hermogenian, Theodosian, and Justinian* codes, the capitularies, the decrees and decretals, the orders and constitutions of bishops, the *Curfus Canonicus*, the *Clementines, Concordates*, and an infinite number of the canon law, the bare names of which, it would be too tedious to mention.

Those who think there are many reports published already seem to be of *Caligula's* opinion, who intended to burn all the law books then extant; foolishly imagining, that equity would run clearer and justice be quicker, when the niceties and perplexities of the law, were exploded: as if the sudden, crude and undigested conceits of men, could be preferable to the grave and deliberate resolutions of a succession of great masters in justice and judicature.

7 Co. 4. Law is the rule of right and property; and the determinations of the judges, those *leges loquentes*, are applications of that rule in various cases, and the best explanations of it, where it is obscure and doubtful. They furnish the means of determining parallel cases without the expence of that investigation at first employed in difficult points. Judges thereby see not only with their own eyes, but also with the eyes of their learned and judicious predecessors; whose observations they cannot fail to profit by and improve. It is, therefore, ridiculous to think that the subject of reports is exhausted, when we daily see so great a variety of cases; out of which, the rich invention of lawyers do always discover something new; that falls not directly under former precedents, but must still be determined by analogy.

It hath been somewhere observed, that till Mr. *Vernon's* reports were published, a man must attend the Court of Chancery many years, before he could acquire any tolerable knowledge of the rules and

maxims of equity, on which the resolutions of that court are grounded; "for it hath not formerly been (neither yet is it) a thing unusual for the great and learned professors of the law to ingross into their own hands, the best and most authentic reports for their better help, credit, and advantage, during their practice, which being unknown to other men, they cannot upon sudden occasions, make answer thereunto." Pop. Rep.

[xi] All laws are calculated for the public advantage: and as it is impossible to frame a law that should provide for, and take in, every case that may seem to be within the intent of it; and since it is reasonable that every law, made for the government of a society, should be made known: so it seems natural, that the explanation and construction of such law should be made public. It is, therefore, for the honour of the superior courts, that their judgments and resolutions ever grounded upon justice and equity, should be promulged; and it is the interest of the subject to be instructed how they may be relieved against deceit and fraud in those great sanctuaries of plain dealing and honesty.

The regular and periodical publication of the resolutions of the judges upon litigated points of importance, would undoubtedly be useful not only to themselves and their successors, but to gentlemen of the bar and the students, who are advised by lord Coke, "to read first the later reports; because, for the most part, the later resolutions and judgments are the surest; and therefore best to season them with in the beginning, for the better settling of their judgments and retaining them in memory; and are easier to be understood than the antients. And in another place 1 Inst. 249. b.

he says, "the reporting of particular cases or exam- 6 Rep.

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9 Rep. ples, is the most perspicuous course of teaching the right rule and reasons of the law: for so, continues he, did *Almighty God* himself, when he delivered by *Moses* his judicial law; *exemplis docuit pro legibus*; as appears from *Exodus, Leviticus, Numbers, and Deuteronomy*: and the glossographers, to illustrate the rule of the civil law, do often reduce the rule to a case, for the more lively expressing and true application of the same. "And I have," says lord *Coke*, in another place, "reported certain cases, which have been adjudged and resolved, together with the reasons and causes thereof; to the end that the learned who know the law may be confirmed; such as know it not may be instructed; the possessions and interests of all in general strengthened and quieted; love and charity between man and man continued; and unnecessary suits, the causes of contentions and expence, prevented. And tho' the same point be determined several times over; yet *optima legum et consuetudinum interpret est res perpetuè similiter judicata*. And *veritas sepius agitata magis splendescit in lucem*."

1 Inst.

We have lately observed the students flocking to the courts at *Westminster*, with the same ardour as the *Roman* youth formerly attended the forum to hear the *Greek* orators. But though they endeavour to take notes of the proceedings there, yet they probably omit many material points, notwithstanding all the pains they take; which may be partly owing to their inability of keeping pace with the speaker, and partly for want of discernment to distinguish what was truly material; and by that means suffering the aromatic spirit of the argument to evaporate, and retaining only the extract, or *caput mortuum*: It is, therefore, evident, that they cannot derive so much benefit from these arguments, as if they had them full [xii]

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and correct at their chambers; where they might consider and deliberate on the merits of each case; the disposition and arrangement of the proofs; the strength and solidity of the arguments; the purity of the language; the artful glosses of the counsel; and afterwards the pure wheat cleansed from the tares, by the judges: besides that the speeches at large might serve them as models to copy after in their arguments.

“I do not hold,” says the great lord *Bacon*, “the Law Treat. laws of *England* in so mean an account, but that what other laws are held worthy of, should be due likewise to our laws. Therefore, when I found that not only in the ancient time, but now at this day, in *France*, *Italy*, and other nations, the speeches and, as they term them, the Pleadings which have been made in judicial cases (where mighty and famous) have been set down by those that made and published them; so that not only a *Cicero*, a *Demosthenes*, or an *Eschines*, hath set forth his orations, as well in the judicial as deliberative; but a *Marian* and *Pavier* have done the like by their pleadings; I know no reason why the same should not be brought in use by the professors of our law, for the arguments in principal cases. And this I think the more necessary, because the compendious form of reporting resolutions with the substance of the reasons lately used by Sir *Edward Coke*, lord Ch. Just. of the *King’s Bench*, doth not delineate or trace to the young practitioners of the law, a method and form of argument for them to imitate.”

I have added the pleadings at large, saith lord *Coke*, 1 Rep. as well for the warrant and better understanding of the cases and matters in law, as for the better instruction of the curious reader in good pleading, which

## xl *Proposal for rendering the Laws*

maſter *Littleton* ſaith is one of the moſt honourable, laudable, and profitable things in the law."

By following this method accurately, judicial determinations would become fixed and ſettled precedents, without being ſubject to that uncertainty, which is generally obſerved, in caſes taken by different perſons : and publiſhed after their deaths ; "for I have often obſerved," ſaith lord *Coke*, "that for want of a true and certain report, the caſe that hath been adjudged, ſtanding upon the rack of many running reports (eſpecially ſuch as underſtood not the ſtate of the queſtion) hath been ſo differently drawn out, that many times the true parts of the caſe have been diſordered and diſjointed, and moſt commonly the right reaſon and rule of the judges utterly miſtaken. And hereout have ſprung many abſurd and ſtrange opinions, which have been carried about and fathered upon the judges by the multitude, and ſometimes by the learned."

Before the determination in the duke of *Norfolk's* caſe, all the lawyers in *England* were of opinion againſt the point, as it was determined ; but they afterwards concurred in that reſolution, which could [xiii] be owing to nothing elſe but the printing that caſe and the ſpeeches at large.

Trade and commerce are likewiſe intereſted in this publication. How many caſes relative to bills of exchange, notes of hand, inſurances, charter parties, and ſtocks, are every day determined. And might not theſe determinations be of uſe to merchants ? Might they not frequently diſpoſe of their intereſts upon the ſaith of ſuch precedents ? One ſide of *Weſtminſter-Hall* is ſometimes governed by the other. How is it poſſible, therefore, for the gentlemen of the bar, who conſtantly attend one end of the hall, to

know what is done at the other, unless by such a periodical publication.

Another considerable advantage arising from this practice will probably be the reviving the art of speaking, and the fixing, ascertaining, and correcting, not only the standard of the law, but that of the *English* language. It is well known that the perfection of the *Greek* and *Roman* languages was principally owing to the study of oratory, and that these were the only two nations that brought their languages to perfection.

There is another great advantage that will attend this publication : It will prevent the multiplying of our reports ; since otherwise the notes that are now taken by the judges, barristers and students, may be published in distinct volumes, after their deaths, and the publick thereby burthened with the expence of purchasing the same cases reported differently by different persons ; whereas one full, correct, and accurate report of each, made under the inspection of the judges and lawyers concerned, will be sufficient, and answer every valuable purpose ; besides, that by this means we might learn what cases are authorities, and what not, and in a short time be able to reduce our reports to a narrower compass, by expunging, like *Justinian*, such determinations as were denied to be law by the judges. “ A multitude of flying reports will hereafter creep forth, whereby, instead of that plentiful and profitable increase which those fields thus by vigilant husbandmen tilled, would have yielded to our students, we shall be entertained with barren and unwarranted products ; *Infelix lolium et steriles avenæ* ; which not only tend to the depraving the first grounds and reasons of our students at the common law, and the young practisers thereof, (who

Cro. Car.



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by such lights shall be misled, and thereby their clients' causes either delayed or miscarried, and multiplicity of law-suits rather cherished than suppressed) but also to the contempt of the common law itself, and of divers grave and learned justices and professors thereof, whose honoured and reverend names shall in the said books be cited and invoked to patronize the indigested crudities of these plagiaries."

The last advantage we shall mention that would attend this publication is, to furnish the students with a collection of cases founded on experience and common life, on which to exercise their abilities. [xiv]  
"Most of our knowledge," says Mr. *Home*, "especially that of law, is by induction. It must therefore be of singular use to such as apply themselves to this study, that there are at hand a great number and variety of cases ready invented; upon which they may exercise their reason. Every one must be sensible, who is ever so little acquainted with the *Roman* law, how hard some of the authors have been put to it for cases and examples to illustrate their doctrines, and what poor ones, after all, they employed, when they were reduced to invention. And no wonder, since invention is perhaps that which requires the greatest reath of genius. It seems plain then that variety of law cases, tho' but rarely proposed, must be of advantage: they are a stock of materials for the mind to work upon; an opportunity is afforded us to apply principles; the judgment is exercised, and by exercise ripens to its perfection. Our law comes thus to be enriched with new thoughts, new discoveries, new arguments, struck out by the invention of our lawyers."

DiA. Decis.

The great use, therefore, of reporting and making public the determinations of the judges in matters of

moment, being evident from the practice of other nations, from the authority of two great oracles of our own law, and from common sense and reason ; it were to be wished that application were made to the judges of his majesty's courts at *Westminster*, on the necessity of having their judgments and resolutions accurately taken and published for the public benefit ; and that a person properly qualified should attend each court for that purpose. " This constitution of reporters," says lord *Bacon*, " I obtained of the king, after I was chancellor ; and there are two appointed, each with a stipend of one hundred pounds a year."

A reporter thus appointed, should have a liberal education ; understand both the theory and practice of the law ; be able clearly to comprehend the reasoning of the judges, and be ready at writing down what he hears in short hand, or otherwise ; and afterwards properly digesting it. And to do this effectually, the matter should be methodized in such a manner, the several facts so disposed, and the whole so perspicuous and clear that all persons may easily understand the report. All addresses to the passions, all glosses and ornaments of counsel which they may deem necessary in their pleadings, should find no place in the state of the case. The reporter, in telling the story, ought not to speak as one of the counsel concerned in the cause, but, as it were, as a judge. The narration ought not to be supported either by florid expressions, by the boldness of figures, or by the powers of the pathos, but by a perspicuous, simple, and natural diction ; a style not so easy to attain as may be imagined.

" A reporter's chief care and labour should be <sup>9 Rep.</sup> (according to lord *Coke*) that for the advancement of truth the matter might be justly and faithfully re-

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lated ; and, for avoiding obscurity and novelty, that [xv]  
it might be in a legal method, and in the lawyer's  
dialect, plainly delivered ; that no authority cited  
might be willingly omitted or coldly applied ; no  
reason or argument made on either side willingly  
impaired ; no man's reputation directly or indirectly  
impeached, and no author or authority cited irre-  
verently disgraced."

In some cases it will be necessary to illustrate particular expressions by notes. Thus *P. Williams* explains in a note what is alluded to by the following expression ; "and therefore cannot but approve of the indignation that judge (*Hall*) expressed, tho' not in his manner of expressing it ; by telling us what that judge\* said upon that occasion. Several other instances may be seen in *P. Williams*, where it is evidently necessary to explain the obscurity of the text.

Precedents are sometimes cited by the bench and bar, without specifying whence they are taken. A reporter should, therefore, inform his reader where these are to be found ; and, if necessary, give an abstract of them, as well as of every other case cited, in the body of the report, that the reader may clearly see the mutual connection and relation between the principal case and those cited, and be able to judge of the propriety of the application.

An able reporter should likewise be so well versed in our laws as not to be a stranger to the greatest part of what is cited out of the books ; for unless he thoroughly conceives what comes from the bench and bar, he will be no more able to execute this office

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\* *Et per diem si le plaintiff fuit ici, il irra al prison tanq ; il enst fait fine au roy.*

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with success, than one who was ignorant of the principles of astronomy or anatomy would be able justly to report a lecture in either of those sciences. "It is impossible," says lord *Coke*, "to make a just and true 3 Rep. relation of any thing he understands not."

A good reporter should be careful to avoid unnecessary brevity; since by attempting to retain only what is material, he may omit the *ratio decidendi*; the very point or center to which the whole of what is said gravitates; and it is much safer to say too *Plowden.* much than too little; "for he who should reject as vain and superfluous a great part of that spoken, and set forth only that which is pure and pithy, ought to have not only great learning and memory, but also excellence of judgment to discern; for else he will reject as ineffectual, that which is of great pith, and allow of that as effectual, which hath no substance at all, and thereby injure the bar and bench, and give them just cause of offence, and should injure the matter likewise."

Nor is it enough for a reporter to state the arguments of the counsel by the general words, "It was argued for the plaintiff; it was objected for the defendant, and the like;" he should prefix each counsel's name to what he says; "which must be truly *Cre. Car.* expressed, and as near as can be in the words of the party who delivered it; but so as neither its affluence may cloy, or its conciseness be a loss to our students; *ut nec prodiga sit in ea copia, nec damnoſa concinnitas.*"

He should also give the observations and illustrations of the puiſne judges, and not content himself with barely saying, Mr. Justice — was of the same opinion: "for some," says lord *Coke*, "will be persuaded and drawn by one, and some by another, according to the capacity and understanding of the reader or hearer." 3 Rep.

## xlvi *Proposal for rendering the Laws*

It happens sometimes that the judgments of the court are appealed from : and as the publishing of cases in the first instance can be of no use without the final determinations ; so a reporter will naturally prosecute each case to the end ; and since there are many other appeals from *Scotland* and *Ireland* in the *House of Lords*, we should recommend it to him to make an abridgment of such cases, containing only a plain simple narrative of the facts, the arguments and authorities on either side, and the judgments of the house. It may, perhaps, be objected that the *Scotch* cases there determined can be of no use in *England*, as they are governed by laws quite different from ours ; in answer to which, it should be considered, that all laws derive their force and authority from reason, and are emanations from the laws of nature (which are the same in all countries, though each hath its own municipal laws and customs) and that the proceedings of, and the actions instituted in the court of session in *Scotland*, are grounded on the *Roman* law, “without which, *Cujacius* the celebrated civilian says, no nation can be well governed ; and adds, that without the knowledge of that divine science the most prudent, wise, and fortunate man, will have but a very imperfect idea of equity and true justice.” It must be agreeable to every lover of jurisprudence to see and hear proceedings that so nearly approach to those of the *Romans* ; who not only subdued the world by their arms, but still continue to exercise a more glorious dominion (the effect of their superior wisdom) over the minds and hearts of mankind.

Thus far with respect to the adjudications and decisions of the courts at *Westminster*. As to the statute law, the great lord *Bacon* made the following proposal for reforming it to king *James I.*

Epist. to his  
son.

Bacon's Law  
Tracts, Statute  
Law.

"The reforming and recompiling of the statute law consists of four parts. The first is to discharge the books of those statutes where the case, by alteration of time, is vanished; as *Lombards*, *Yews*, *Gauls* halfpence, &c. these may yet remain in the libraries for antiquities; but should not be reprinted. The like I propose of statutes long since expired, and clearly repealed; for if the repeal be doubtful, it must be so propounded to the parliament."

[xvii] "The next is, to repeal all statutes, which are sleeping and not of use; but yet ensnaring and in force. And here it will, perhaps, be sometimes requisite to substitute a more reasonable law instead of them, agreeable to the time; in others a simple repeal may suffice."

"The third is, that the grievousness of the penalty in many statutes be mitigated; though the ordinances stand."

"The last is, the reducing of concurrent statutes heaped one upon another, to a single, clear, and uniform law; towards this there has been already, upon my motion, and your majesty's direction, a great deal of good pains taken; my lord *Hobart*, myself, serjeant *Finch*, Mr. *Heneage Finch*, Mr. *Noy*, Mr. *Hackwell*, and others, whose labours being of a great bulk, 'tis not fit now to trouble your majesty with any farther particulars therein; only by this, you may perceive the work is already advanced."

"But because this part, which concerns the statute laws, must of necessity come to parliament; and the houses will best like what themselves guide, and the persons themselves employ; the way were to imitate the precedent of the commissioners for the canon laws in 27 *Hen.* 8. and 4 *Edw.* 6. and the commissioners for the union of the two realms, *primo* of your

majesty ; and so to have the commission named by both houses, yet not with a precedent power to conclude, but only to prepare and propound to parliament."

"This is the best way, I conceive, of accomplishing so excellent a work ; of honour to your majesty's times, and of good to after times : which I submit to your majesty's better judgment."

If then a reformation of the statute-law, was deemed expedient by lord *Bacon*, at a time when *all* the acts of parliament then subsisting (including the original *Latin* and *French*, and the *English* translation) were contained in less than two volumes in folio ; how much more necessary is it *now*, when they are increased to above six times that number ?





## HILARY TERM.

7 GEORGE II. 2. REGIS, in B. R.

Philip Lord Hardwicke, *Lord Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.* } *Justices.*

William Lee, *Esq.*

John Willes, *Esq. Attorney General.*

Dudley Ryder, *Esq. Solicitor General.*

### Hooker *versus* Hooker.

*A question in dower sent by the court of chancery  
for the opinion of this court.*

- [1] **W**ILLIAM HOOKER the elder, and his Dower.  
 wife, and *William Hooker* the younger,  
 and his wife, by their deed dated 12th  
*July* 1699, covenanted to levy a fine to  
 the use of the conusees in fee. The fine  
 was levied, and afterwards the conusees by lease and  
 release convey to *Young* and *Goady* for the use of  
*William Hooker* the elder for life, and to his wife, if  
 she survive; then to *William Hooker* the younger



for life, who was the son and heir apparent of *William Hooker* the elder; remainder to his first and other sons in tail; remainder to his daughters in tail; remainder to *William Hooker* the elder in fee, with power to *Hooker* the younger to settle on any other wife. *William Hooker* the elder, and his wife, died without other issue in the life-time of *William Hooker* the younger, whose wife also died. *William Hooker* the younger had two other wives, and the last is the plaintiff; and he being dead without issue, the question is, whether the last wife be intitled to dower in these lands.

The counsel for the plaintiff argued, that this question depended upon what estate *Hooker* the younger had at the death of *Hooker* the elder; for by the deed it is plain he took only an estate for life, but it is apprehended that the remainder in fee descending and coming to him on the death of *Hooker* the elder, the plaintiff will be plainly intitled to her dower. And in case the remainder did not descend to him, it will be the same; for both estates were so consolidated as to make him tenant in fee. But it has been objected, that though the estates were consolidated, yet that they might open again to let in the contingent remainders, as was held in *Lewis Bowles's*\* [2]

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\* *Lewis Bowles*, esq. brought an action upon the case upon *Trover* against *Hafeldine Bury* the younger, which began in the *King's Bench*, *Hil. 10 Jacobi Regis. Rot. 1319.* and declared, that he was possessed of 30 cart loads of timber and lost them, and that they came to the hands of defendant, and that he, 20 Feb. Anno 9 Jac. Regis, at *Norton* in the county of *Hertford*, converted them to his own use; and upon not guilty pleaded, the jury gave a special verdict to this effect. *Thomas Bowles*, esq. grandfather to the said *Lewis*, was seised of the manor of *Norton-bury* in the said county in fee, and 1 Sept. An. 12.

- [3] case in the 11th report; and therefore that *Hooker* the younger was in effect but tenant for life, and

by indenture, betwixt him on the one part, and *William Hide* and *Leonard Hide* of the other part, in consideration of a marriage to be had betwixt the said *Thomas Bowles*, and *Anne* daughter of the said *William Hide*, &c. covenanted that after the said marriage had and solemnized, that the said *Thomas*, his heirs and assigns, would stand seised of the said manor of *Norton-bury* to the use of the said *Thomas* and *Anne*, for the term of their lives, without impeachment of waste; and after their deceases to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, &c. and for want of such issue, to the use of the heirs male of the body of the said *Thomas* and *Anne* lawfully begotten; and for want of such issue, to the use of *Thomas Bowles*, son and heir apparent of *Thomas Bowles* the grandfather, and the heirs males of his body begotten; and for want of such issue, to the use of the heirs of the body of the said *Thomas* and *Anne* lawfully begotten: Which marriage was solemnized accordingly, and the said *Thomas* the grandfather, and *Anne* had issue *John*; and afterwards the said *Thomas* the grandfather died without any issue on the body of *Anne* but the said *John*, after whose death the said *Anne* entered into the said manor and was thereof seised, with the said remainder over as aforesaid; and afterwards the said *John Bowles* died, and afterwards *Thomas* the son conveyed by fine his remainder to the use of *Lewis Bowles* the plaintiff, and *Diana* his wife, and the heirs males of his body; and the said *Anne* so being seised of the said manor, with the remainder over as aforesaid, *viz.* 20 Feb. An. Reg. Jac. Reg. 9. a barn parcel of the said manor *per vim ventorum & tempestatis penitus subvers.* & ad terram dejeB. fuit, and that the said 30 cart loads of timber in the declaration mentioned were parcel of the said barn, and that the said timber was found and fit for building, whereof the defendant as servant of the said *Anne*, and by her command, took the said timber and carried it out of the limits of the said manor to *Radial* in the same county; and afterwards the said *Anne*, 24 Feb. Anno 9 Jac. Reg. made her last will, and thereof made *Robert Osborne* and *Leonard Hide*, knts. her executors, and died; after whose death the plaintiff seized the said timber,

consequently that the plaintiff his widow can be no way intitled to dower in these lands. But in answer to this objection, it must be considered, that the reason of *Lewis Bowles's* case was, because all the claims appeared by the same deed; but here this is a matter intirely *dehors* the deed: besides, as *Hooker* the younger died without issue, there never was any occasion to open the estates; and by his death the contingency is intirely determined; the contingent remainder was destroyed on the death of *Hooker* the elder; and the fee falling on the estate for life could not but drown the estate for life so as to stop the contingent remainders; which as they could not take effect on the death of *Hooker* the elder, never should afterwards. They cited 2 *Jo.* 76. which was a writ of error of a judgment out of the *King's Bench* in *Ireland*, upon a judgment there affirmed, which was

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and afterwards the defendant by the command of the said executors converted it to his own use, and if upon the whole matter the defendant was guilty or not, the jury prayed the opinion of the court.

And in this case two questions were moved. 1. If upon the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant after possibility, *sc.* to do waste, &c. 2. Admitting that she should not have the privilege, &c. if the clause of without impeachment of waste, should give her property in the timber so blown down by the wind.

And in this case eight points were resolved by the whole court. 1. That till issue, *Thomas* the grandfather and *Anne* were seised of an estate tail executed *sub modo*, *sc.* till the birth of the issue male, and then by the operation of law, the estates are divided, *sc.* *Thomas* and *Anne* become tenants for life, the remainder to the issue male in tail, the reversion to the heirs males of *Thomas* and *Anne*, the remainder over as aforesaid; for the estate for their lives is not absolutely merged, but with this implied limitation till they have issue male. 11 *Co.* 79, 80. *Lewis Bowles's* case.

given in the *Common Pleas* in *Ireland*. The case was thus: *A.* the grandfather seised in fee conveys to the use of himself for life, remainder to *B.* the father for life, remainder to the first son of *B.* in tail, reversion to *A.* in fee. The grandfather *A.* dies, living *B.* but no son then born to *B.* but afterwards a son is born, named *C.* Whether by the death of *A.* before the birth of *C.* by which the reversion in fee descended to *B.* the contingent remainder was destroyed, was the question. It was argued, that this descent was an act in law which will injure no man; and, as in *Lewis Bowles's* \* case it is said, that the tail is vested *sub modo* in the father; and after, when the contingency happens, the estates before united are divided; so in this case it shall be by the descent of the reversion, which is an act in law, and does not operate more than the original conveyance, though the estate for life is merged in the fee. But on the other side the case of *Lewis Bowles* was agreed; for there the intent of the conveyance should be destroyed by itself, if the contingent estate should not vest by the birth of the son; but here the descent consolidates the inheritance; and though by act of law, yet by an act out of the conveyance itself. And the case being clear upon this point, it was adjudged, that the remainder was destroyed; and so former judgments in *Ireland* affirmed. 2 Jo. 76. *Intratur Hil. 26 & 27 Car. 2. Hartpool v. Kent. Vent. 306. S. C. Kent v. Hartpool.* The court seemed of opinion, that the contingent remainder was destroyed by the descent of the estate tail. But *Adjournatur*.—

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\* Note, in *Lewis Bowles's* case, the estates were united at the first upon making of the conveyance. *Vent. 307. per the Reporter.*

*Pollexf.* 206. S. C. says, this case was never adjudged, but for defaults in the writ of error, the court could not proceed to judgment, but inclined to affirm the judgment.—*Ibid.* 578. *Arguend.* In the case of *Harrison v. Belsay*, says, this case was not adjudged, but the court much inclined, that the contingent estates were destroyed.—*Hartwell v. Keck. Freem. Rep.* 405. *pl.* 530. *Trin.* 1675. seems to be S. C. And there *Hale Ch. J.* inclined to think the remainder destroyed; *Sed adjournatur.* [4]

They insisted on this as a case in point; but admitting there might be an opening, they thought the fee was so far executed as to intitle the wife to dower. Estates in dower are very much favoured in law; the wife of a man seised of a defeasible or base fee shall be endowed till the estate is defeated. So is *Seymour's* case in the 10th report. If a disseisor dies seised, the widow shall be endowed as long as the estate continues.

The counsel for the defendant argued, that it could not be controverted, but that the father in this case has made his son a purchaser, and that a man may make his heirs purchasers if he parts with the whole estate. The present case is very different from the case of *Kent* and *Hartpool*, because there the fee was vested in the grandfather, and therefore descended to the tenant for life as his heir, and so merged that estate, but this case is not so. In *Wisco's* case, 2 *Co.* 60. this distinction is taken, *viz.* "When the fee is limited by one and the same conveyance, there the one may have fee-simple, and the other an estate for life jointly; but when they are first tenants for life, and afterwards one of them doth get the fee-simple, or the fee-simple doth descend to one, there the jointure is severed. As if a man makes an estate

to three, and to the heirs of one of them, there one of them hath fee-simple, and yet the jointure doth continue, for all is but one entire estate created at one and the same time, and therefore the fee-simple cannot merge the jointure, which took effect with the creation of the remainder in fee;”—This plainly shews that an estate for life is not to be merged in a remainder in fee, if the different titles arise from the same deed, as they do in the present case.

In the case of *Plunket and Holmes* in *Sir T. Raym.* 30. it is said, though the fee descends, it shall not confound the estate for life, but there shall be an *Hiatus* to let in the contingency when it happens; so is *Lewis Bowles's* case, where, notwithstanding the estates were consolidated, yet it was held that they should open to let in the contingent remainders. If the husband in this case had left a son, nay if the son had been born after his death, it must have defeated the estate in dower. As to the case of the disseisor, his estate is to be considered in law as a rightful estate, at least till the contrary is made appear.

In the case of *Boothby v. Vernon*, which was in *Chancery*, (9 *Mod.* 150.) it is said, that wherever the estate is to determine by express limitation, or condition, on the death of the wife, there the husband shall be tenant by the curtesy; as where an estate [5] for life is limited to a woman; remainder to her first son, and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs; here it is plain she is seised of the inheritance; yet if she has a son, her husband shall not be tenant by the curtesy, because the contingent estate, which is to arise on her death, intervenes between her estate for life and the inheritance. This is a case in point.

By 1 *Roll. Abr.* 676. If *A.* seised in fee of lands, covenants to stand seised thereof to the use of himself and his heirs, till *C.* his middle son takes a wife, and after to the use of *C.* and his heirs, and after *A.* dies, by which it descends to *B.* the elder son of *A.* who has a wife and dies, and after *C.* takes a wife; it seems the wife of *B.* the elder son shall not be endowed of the said estate of her husband; because his estate is ended by an express limitation; and therefore the estate of the wife being derived out of it, this cannot continue longer than the original estate.

There are cases, where it has been held that if there be a possibility of another estate to take effect, it shall defeat the estate in dower: so is 1 *Roll. Abr.* 677. pl. 6. viz. If there be lessee for life, the reversion to the husband in fee, and the lessee leases the land to the husband for the life of the husband, and after the husband dies, and the lessee dies, the wife shall not be endowed thereof; because there was a possibility of a reversion during the coverture as to the freehold.

In the present case there is no possibility that the issue of the marriage should take by descent or inheritance: they could take only under the deed by purchase, and then the rule in *Co. Lit.* 40. should take place, viz. "If a woman taketh a husband seised of such an estate in tenements, &c. so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenement of such an estate as the husband hath, as heir to the husband. Of such tenements she shall have her dower, and otherwise not."

They insisted that the said case of *Plunket and Holmes* was strong in point; and that so was *Cordal's* case, which is thus reported in *Cro. Eliz.* 315, 316.

*viz. Nota* : *Coke* attorney shewed to me a resolution of *Gaudy* and *Anderſon* in a caſe referred to them by the Queen's commandment, in which two points were reſolved ; where a deviſe was to two perſons of lands to hold for payment of the legacies in a will, and the debts of the teſtator, and afterwards to *Ed. Cordal* his brother for life, remainder to his firſt ſon in tail, and ſo to the ſecond, the remainder to the heirs of the body of *Ed. Cordal*. Firſt it was reſolved, that this is no freehold in the two perſons, but only a term for years, although it cannot be ſaid for any certain number of years ; for the profits are not certain, nor the debts ; yet it is a chattel, and *quafi* a term, as a deviſe during the minority of *J. S.* or land extended for debt ; and this is in favour of wills, but otherwiſe it is of ſuch a limitation in a deed, for there it is a freehold conditional. *V. 8 Co. Manning's caſe.* 2dly, It was reſolved, that the eſtate tail was not executed for the poſſibility of the mean eſtate that might interpoſe, and therefore it was always diſjoined, during the life of *Ed. Cordal*, ſo that of that eſtate his wife could not be endowed ; and this was reſolved upon conference.

[6]

The counſel for the plaintiff replied, that the counſel for the defendant argued, as if the intent of the parties were to govern ; but taking it to be ſo, it cannot be preſumed but that at the time of making the deed it was well known that *William Hooker jun.* would be heir to his father ; and that *eo inſtante* on the death of the father the two eſtates would be consolidated : and allowing *Plunket* and *Holmes* and *Boothby* and *Vernon* both to be law, yet they will not affect or come up to the preſent caſe. If the contingent remainder in this caſe had not been deſtroyed by the fee falling upon the eſtate for life, they admit that the iſſue muſt have taken by purchaſe ; but as that



estate is defeated, and as a contingent remainder once destroyed can never revive, the issue shall take by inheritance, as heir at law to their father; and therefore the rule cited out of *Co. Lit.* will not prevail.

*Ch. J.* The general questions in this case are; first, Whether the contingent remainder was destroyed by the reversion in fee falling on the estate for life. And, secondly, admitting that it was not, and that there might be an opening, whether this possibility would destroy the dower. As to the first, I am inclined to think the contingent remainder is destroyed. We cannot in this case collect the intent of the parties, or take into consideration any subsequent act *dehors* the conveyance, and therefore to say any other matter than what appears upon the face of the conveyance was in the contemplation of the parties, cannot be of any weight. The case of *Kent and Hartpool* seems to be a very strong case in point.

In the case of *Purefoy and Rogers*, 2 *Saund.* 380. the express opinion of *Hale* and the judges was, that the purchasing the remainder in fee by the tenant for life totally destroyed the contingent remainder, and that it could never be let in again, though the particular estate were revived.\*

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\* *M. a Feme Covert was tenant for life, remainder to her first son; the reversioner in fee, before any son born, conveyed the inheritance by fine to M. and her husband; a son was afterwards born, and then M. died. Per Cur.* Though if *M.* had survived her baron she might have avoided and waived the estate taken by the fine, yet the contingent remainder to the son is utterly destroyed, he not being in *esse* when the contingency happened; for *M.* and her baron took by *entireties*, and so *M.*'s estate was merged before the contingency happened; and the possibility which she had to waive the inheritance, and so to take back her estate for life, will not preserve it; for if the particular estates which support contingent estates are not in *esse* when the contingency

- [7] But suppose the estate for life not to be absolutely merged, but that there still remained an *Hiatus* to let in the contingencies, as in *Lewis Bowler's* case; yet I do not think that this possibility will defeat the wife's title to dower, when the contingency never happened. The books say that the estates in such cases are consolidated; and none of them says, that, if any of the estates opened the tenancy in fee, the wife could not be endowed. *Cordab's* case in *Cro. Eliz.* 315, 316. is the only case which contradicts these resolutions; but in the case of *Puresfoy and Rogers*, this case was denied to be law: And I have seen a note of a like case in the *Common Pleas*, where it was likewise denied to be law by *Bridgman*. But I think the judgment in *Duncomb and Duncomb*, 3 *Lev.* 437. is right. The case was thus: "Dower, and upon *Nunquam seisse que Dower* pleaded, and thereon a special verdict, the case was, *William Duncomb* tenant for life, the remainder to *J. S.* and his heirs for the life of *William*, the remainder in tail to *William*, viz. to the heirs males of his body, the remainder to *George Duncomb* the now tenant. *William* married the demandant and died without issue, and whether the demandant should be endowed, was the question; viz. Whether the re-

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happens, the contingent estate can never arise, whether it happens by surrender, merger, feoffment, or any other way; and judgment accordingly. 2 *Saund.* 380. 2 *Lev.* 39. S. C. Hil. 23 & 24 Car. 2. B. R. *Puresfoy v. Rogers*. And per *Hale*: In all cases where the particular estate is merged in the reversion, there the contingent remainder is gone, though there is no divesting of any estate: as if tenant for life, remainder in tail in contingency, remainder in tail in *Esse*, be, and the tenant for life, remainder in tail in *Esse*, levies a fine, this is no discontinuance nor divesting any estate, because each gives such estate as he has, and yet the mesne contingent remainder is destroyed. Per *Hale* Ch. J. 2 *Saund.* 380.

mainder to *J. S.* and his heirs for the life of *William Duncomb* be such an interposing estate between the estate for the life of *William* and the remainder to the heirs of his body, that the wife should not be endowed? and for the demandant it was said, that the whole estate was really in *William*, and the remainder to *J. S.* for the life of *William* was no more than a possibility; so that if *William* had committed a forfeiture, *J. S.* might take advantage thereof for preservation of remainders. But in the mean time the whole estate is executed in *W. D.* as in *Lewis Bowles's* case the whole estate-tail was executed in the father till the birth of the first son; and though by this possibility the estate for the life of *William* is not merged, yet the estate-tail is executed to such a purpose that the wife shall be endowed, as 50 *Ed.* 3. 45. Tenant in tail after possibility of issue extinct, with a remainder to him in general tail, marries a second wife; she shall be endowed, though both estates stand distinct in the husband. But the court upon the first argument hastily gave judgment for the tenant."

And upon the whole I think, that *W. Hooker* the younger dying before the birth of a son, the contingency was destroyed; and in the next place, if the contingency was not destroyed; yet as it never happened, the wife is entitled to dower. The case of *Boothby* and *Vernon* doth not in the least impeach this resolution; for in that case the wife was only tenant for life, with a possibility to her issue. [8]

*Page J.* Here is nothing but a possibility, which has never happened, nor can now happen to distinguish this estate from an estate in fee; I therefore think the wife plainly intitled to dower.

*Probyn J.* The distinctions taken in this case may be allowed; and yet the widow be entitled to dower;

besides it is impossible now that the contingencies should ever happen.

*See J. Kent and Hartpool* is to me a very strong case: the words of the book are a vesting *sub modo*, but here there is an actual limitation to the right heirs, which makes the estate vested, and if an absolute vesting, there never can be an opening to let in the remainder; but it is an utter destruction of it.

All clear of opinion that the widow in this case is intitled to dower. Judgment for the demandant.

## EASTER TERM.

7 GEO. 2. IN B. R.

Dobson and others *vers.* Dobson.

**A** WRIT of dower *unde nihil habet* was Dower.  
brought in the duchy court of *Lancaster*,  
and judgment for the demandant. A  
writ of *Seisin* was awarded accordingly,  
and a writ of *Inquiry*; and on the return  
of it, damages were given to the widow to the full  
value of her dower from the death of her husband to  
the return of the writ of *Inquiry*. Error is brought  
in *B. R.* and the following exceptions were taken by  
the counsel for the plaintiffs in error.

First, That no damages can be given in this case. Damages are not to be recovered but in a writ of dower *unde nihil habet*, according to Lord *Co. 1 Inst. 32. b.* But it does not appear that this is such a writ, for the word *unde* is left out.

Secondly, Damages are given *a morte viri*, whereas they should not have been given but from the time of  
[9] suing out the writ of dower; since it does not appear

there was any demand of dower *in pais*; and in *Co Lit.* 32. It is said that the demandant should take care to make demand as soon as possible, lest she lose the value of her dower, and that the heir does no wrong till a demand is made.

Thirdly, there does not appear to have been any default in the tenants; the entry being *quod ipse exact. non ven.* in the singular number, whereas there are four tenants; so that it does not appear that above one was summoned, nor can it be ascertained, which one that is.

And lastly, here is a discontinuance; no day being given to the tenants to appear on the return of the writ of inquiry.

The counsel for the defendant in error argued, that they were intitled to the damages given; for it was incumbent on the plaintiffs, if they would have excused themselves from damages, to have pleaded *touts temps prisi*. As to the omission of the word *unde*, the plaintiffs ought to have brought the original writ before the court by *Certiorari*, otherwise the court will not presume it to be so. And as to carrying damages too far, the natural construction of the words of the Stat. of \* *Merton* is, that the

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\* *Stat. of Mert.* 20 *Hen. 3. A. D.* 1235. "Of widows which after the death of their husbands are deforced of their dowers, and cannot have their dowers or quarentine without plea, whosoever deforce them of their dowers or quarentine of the lands, whereof their husbands died seised, and that the same widows after shall recover by plea; they that be convict of such wrongful deforcement shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows, by judgment of our court, have recovered seisin of their dower, &c. and the deforcers nevertheless shall be amerced at the King's pleasure."

widow shall recover damages till she have seisin. So it was determined in 1 Leon. 56. The case is this : "Walker and his wife brought a writ of dower against *Jervise Nevil*, and judgment was given upon *Nil dicit*; and because the first husband of the wife died seised, a writ of inquiry of damages was awarded, by which it was found, that of the land which she ought to have in dower, the third part was of the value of eight pounds *per Annum*, and that eight years *elapserunt a die mortis viri sui proximi ante inquisitionem*, & *assessant damna* to eight pounds; and it appeared upon the record, that after judgment in the writ of dower aforesaid the demandants had execution upon *Habere facias seisinam*, so as it appeareth upon the whole record put together, that damages are assessed for eight years, whereas the demandants have been seised for part of the said eight years; upon which the tenant brought a writ of error, and assigned for error, because damages are assessed until the time of the inquisition, whereas they ought to be but to the time of the judgment; but the exception was not allowed; another error was assigned, because that where it is found, that the land was of the value of eight pounds *per Annum*, they have assessed damages for eight years, to eighty pounds, beyond the revenue; for according to the rate and value found by verdict it did not amount but to sixty-four pounds: but that error was not also allowed; for it may be, that by the long detaining of the dower, the demandants have sustained more damages than the bare revenue, &c. Another error was assigned, because damages are assessed for the whole eight years after the death of the husband, whereas it appeareth, that for part of the said eight years, the demandants were seised of

[10]

the lands by force of the judgment and execution in the writ of dower; and upon that matter the writ of error was allowed."

To the objection, that there is no default in the tenants, because the default is charged in the entry in the singular number, it is answered that cases in dower are intitled to all the favour the court can shew; and if the word *ipse* be taken in the plural number for *ipsæ*, to agree with *personæ* understood, it will only make it false latin, which will not vitiate; neither is it a discontinuance that no day is given to the tenants to appear on the return of the writ of inquiry. The entries are as in the present case, *viz. Co. Entr. 181. Brow. 222.* Besides it is aided by *Stat. 4 Ann. c. 10* which amongst other things aids judgments whereon writs of inquiry are awarded.

The whole court over-ruled the exceptions on the answers given, except the third, *viz.* that there does not appear to be any default in the tenants, because the words in the entry are *quod ipse exact. non ven.* since the words seem naturally to refer to no more than one person, and it did not seem that on the default of *one* tenant the court should give judgment against *all*; therefore as to this objection they ordered it to be argued again.

Afterward in *Michaelmas* term 8 *Geo. 2.* The counsel for the tenants on this exception argued, that the entry of the judgment being the act of the court, it cannot be intended that more are summoned than are said to have been summoned; and that the word *ipse* having already a good grammatical sense, and not repugnant to any part of the record, it ought not to be rejected. And they cited the words of *Holt Ch. J.* in *Salk. 324, 325, viz.* Where a matter set forth is grammatically right, but absurd in the

sense and unintelligible, we cannot reject some words to make sense of the rest, but must take them as they are ; for there is nothing so absurd or nonsensical, but what by rejecting and omitting may be made sense ; but where a matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected ; as in ejectment where the declaration is of a demise the second of *January*, and that the defendant *possea*, *scil.* the first of *January*, ejected him : here the *scilicet* may be rejected as being expressly contrary to the *possea* and the precedent matter."

The counsel for the demandant argued, that the word *ipse* should be rejected as surplusage ; the sense and diction being better without it ; and that in the case of *Fitzgerald and Clanrickard in Comb.* 168, a woman, tenant in a writ of dower, appeared by her  
 [11] guardian, and the entry of the plea had these words, *viz. Quod ipse non potest dedicere*, and it was the opinion of the court that it might refer to her guardian and be good.

The court were first of opinion that in cases of this nature, which wholly turn upon a critical construction of words, it is incumbent upon the court to endeavour, if possible, to make them good in order to maintain the right of the party. That the word *ipse* could not be rejected in this case ; for the rule is, that words cannot be rejected unless they make an inconsistency ; but if they have a sense as they stand, though it vitiates the thing, they cannot be rejected ; otherwise, any thing may be made right that is wrong. And they said that the statute for the amendment of the law will not help this ;



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for that *Act*\* only aids judgments by confession, *nihil dicit & non sum informatus*, (which are *after* appearance) and writs of inquiry executed thereon, but not judgments by default *before* appearance. But at last the court ruled it good, by taking the word *ipse* (as there are no diphthongs in court hand) in the plural number, and supposing it to agree with the word *personæ* understood. The judgment was affirmed.

*Dominus Rex versus Poole.*

New trial.

THE court was moved for a new trial on an Information in the nature of a *Quo Warranto* against the defendant, to shew cause by what authority he acted as mayor of *Liverpool*; for that the verdict was found on the matter of law against the direction of the judge. Adjourned.

Afterward in *Easter* term this cause came on again, and the judge who tried it, certified that the verdict was found against his direction, and that he was dissatisfied with it. There were four issues; the three first were preparatory to the last, and were excuses for the last mayor's adjournment of the court

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\* By *Stat. 4 Ann. c. 16. sect. 2.* "All the statutes of jeofails shall be extended to judgments which shall at any time afterwards be entered upon confession, *nihil dicit*, or *non sum informatus*, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be said or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of jeofails in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to the law as is now used."

to a day after the day appointed by the charter. And the jury found that there was no necessity for such adjournment, with which verdict the judge reported himself satisfied. The last issue was whether or not the defendant was duly elected mayor, and the jury found him not duly elected; and this was the verdict with which the judge was dissatisfied. The point of law was, whether the late mayor had a power to adjourn the election of a new mayor to a day beyond the charter day.

- [12] The counsel for the prosecutor argued, that though it is the general rule to grant a new trial on a jury's finding the matter of law against the direction of the judge; yet if it should appear to the court above that the judge had mistaken the law in his direction, and that therefore the jury had found right, the court would not grant a new trial, since the jury could at length find no otherwise; and it would put the parties to the expence of a new trial to no purpose; for should they again be directed in the same manner as before, and find accordingly, the court would grant a new trial for the misdirection of the judge. And it appears in this case, by the record before the court, that the judge had mistaken the law; and though his report is conclusive as to matter of fact, the court having no other means to be satisfied of it; yet it is not so as to the matter of law, as that may be collected in many cases from the record. This may be compared to the case of an immaterial verdict for the defendant, wherein, if it appears that he has made out no title by his plea, or confessed the action, judgment will be given for the plaintiff; as in case where on an information in the nature of a *Quo Warranto*, there is a verdict for the defendant, and yet judgment is given for the prosecutor, because

the plea had not traversed the usurpation. In 9. *H.* 6. 37. *pl.* 12. it is stated, that if in debt the defendant pleads such matters as shew that in point of law he owes the debt, and yet concludes that he owes nothing, the plaintiff may nevertheless claim judgment upon the confession, and that though there should be a verdict for the defendant, yet judgment will be given for the plaintiff. 2 *Rol. Abr.* 99. In action upon the case for slanderous words, there is a plea in bar, and a replication, and issue joined, and a verdict for the plaintiff, yet if the defendant had confessed the action in his plea in bar, and his plea is insufficient in law, and the issue upon the replication is void in law, the plaintiff shall have his judgment upon the declaration. *Hil.* 33 *Eliz. Rot.* 27. between *Lacy* and *Reynolds*, in action upon the case for these words, *He is a false knave, and as arrant a thief as any is in Warwick gaol.*

They cited 1 *Salk.* 173. *Jones v. Bodinham*, viz. Trespass for taking his cattle in *A.* Defendant justified a taking in *B.* by process with an impossible *Tesse*, *virtute cujus* he took them, and traversed the taking in *A.* Upon that traverse issue was joined, and found for the plaintiff, and damages assessed: It was objected in arrest of judgment, that this issue was immaterial, for it is all one where the defendant took them, since he took them without warrant, the process being void; *quod fuit concessum.* It was moved then for a repleader. *Et per Holt Ch. J.* a repleader cannot be where there is a trespass confessed, and the verdict was set aside, and a writ of inquiry awarded, because the issue being immaterial, the jury had no power to inquire of damages: And judgment was entered for the plaintiff on the confession, and not upon the verdict. *Vide Mo.* 696. *Yelv.* 89. 1 *Cro.*

[13] 25, 214. *Hob.* 327. 2 *Rot.* 99. 3 *Cro.* 722, 778, 227, 214, 445. 2 *Cro.* 678. 1 *Saum.* 128. *Ray.* 458.

They cited 1 *Salk.* 173. *Staple v. Haydon*, viz. Where the defendant pleads an ill plea, but the matter, if well pleaded, might have amounted to a good bar or justification, judgment can never be given against the defendant, as by confession; but where the matter though never so well pleaded could signify nothing, judgment may in such case be given, as by confession, as if in case for calling him thief the defendant should justify, for that he received a thief. *Per Holt Ch. J.*

*Yelv.* 169. *Hil.* 7 *Jac.* 1. in *B. R. Molineux v. Molineux*. In debt in the *Common Pleas* against *Molineux* on a bond as heir to his father, the defendant there pleaded *riens per discent* except twenty acres in *D.* in such a county. The plaintiff replied, that the defendant had more by discent in *S.* viz. so many acres: And upon that they were at issue, and it was found for the defendant, that he had nothing by discent in *S.* wherefore the plaintiff recovered, and had judgment to have execution of the twenty acres in *Dale*: Upon which judgment the defendant in the *Common Pleas* brought error; and assigned for error a discontinuance in the record of the plea *a termino paschæ usque ad term' Mich'* after. And whether it was aided by the statute 18 *Eliz.* because it was after verdict, was the question? And it was adjudged that it was out of the statute, and that it is error; because the judgment was not founded on the verdict, but only on the defendant's confession of assets, and the verdict here was to no purpose, but made the defendant's confession more strong; so the statute 18 *Eliz.* is to be intended where the trial

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by verdict is the means and cause of the judgment. Wherefore the judgment was reversed.

*Trin. 4 Geo. 2. Broome and Woodward in MS.* Trespafs for entring plaintiff's house and taking away his goods; the defendant justified for a distress for rent, and that the goods were appraised and the appraisers sworn before the headborough, and the residue of the money returned. Upon this plea issue was joined; and verdict for the defendant, but judgment for the plaintiff; because it appeared by the act of parliament that the appraisers should be sworn before the sheriff or constable, whereas it was alleged in the plea that they were sworn before the headborough.

*Easter 4 Ann.* A case in serjeant *Salk.* manuscript notes. Trespafs for throwing down and carrying away stalls. As to all the trespasss, but throwing down, the defendant pleads not guilty; and as to the throwing down a special justification, in which the defendant admitted both the throwing down and carrying away the stalls; the judge of the *Nisi prius* refused to try the cause because the action was confessed, and afterwards on motion in the court above, it was held that the judge did right.

The following exceptions were taken to the opinion of the judge, *viz.* that it appears upon the face of the record that the defendant *Poole* was not elected mayor according to the charter; for the charter appoints the 18th of *October* for the election, [14] whereas the defendant has set forth in his plea that he was chosen on the 19th, and that the act of 11 *Geo. 1.* does not give a power to mayors to adjourn the election at their own will without any reason to a day when their power is expired. Neither does it give any authority even on an

adjournment, to proceed upon a poll taken the first day, but they must begin *de novo*. That it appears upon the record that the late mayor, whose power determined the day before, presided at the election, when the defendant was chosen, whereas the act requires that the next officer should preside, the mayor's power being determined. That the statute directs the election to be begun between the hours of ten in the morning and two in the afternoon, whereas it appears by the defendant's plea, that this election began between eight and nine in the morning. That it appears that this defendant was elected the 19th of *October*, and yet he pleads an election for the year next ensuing, whereas by the charter his office expires the 18th of *October*, which is within the year. On all which accounts it appears that this cannot be a lawful election, and therefore no new trial should be granted.

*Hardwicke Ch. J.* I think a new trial ought to be granted in this case. The general rule is, that if the judge of *nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is a sufficient ground for granting a new trial; and when the judge upon a doubt of law directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial. But to these general rules there are some limitations as clear as the rules themselves. One is, that the judge should direct the jury plainly and certainly. If he should be wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the superior court (under whose direction all trials at *nisi prius* are) that the judge was undoubtedly mistaken, the court would not grant a new trial, because

it would be putting the parties to trouble and expence to no purpose; and if the next judge should direct the jury in like manner, and they find accordingly, there must be a new trial for misdirection. Another limitation is, that it appears upon the record before the court that it is impossible that the defendant should have judgment, by reason of his bad plea, though the verdict were found for him; but then these things must appear very clearly, and it must be where every thing appears upon the record that can possibly arise upon the trial; for if all the matter does not so appear, and the verdict may possibly prejudice the defendant in point of law, the court ought in justice to grant a new trial. But in the present case it does not appear sufficiently upon the record, that the law is against the defendant, nor that his plea is so bad that he could not have a judgment, were the verdict found for him.

Had the present case depended wholly on the Common law, it seems that no new trial ought to have been granted; for the law before the 11th of *Geo. 1.* was taken to be, that the mayor's office was determined at the end of the year; and therefore it seems that it would have been a void election where the adjournment was made to a day after the expiration of his office; especially when it is done without cause. But the statute of\* 11 *Geo. 1.* [15]

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\* *Stat. 11 Geo. 1. cap. 4. sect. 1.* If in any city, borough or town corporate, in *England, Wales* and *Berwick*, no election shall be made of the mayor, bailiff or chief officer, on the day, or within the time, appointed by charter or usage; or such election being made, shall afterwards become void, whether such avoidance shall happen by default of officer, or any other accident whatever; the corporation shall not be dissolved: But where no election shall be made, the members of such city, &c.

was made to remedy such inconveniencies, and on that act I think this cause ought to be tried again. It seems indeed it ought to have been the original intent of that act to enable corporations to go to an entire new election on a subsequent day where no election had been begun before; but notwithstanding, as this is a remedial law to prevent inconveniencies arising from non-elections of annual officers on the charter day, if the words of the act are large and general enough to comprehend the continuing of elections began on the charter day, but not compleated within that time, as the mischief is the same, the court ought to give a liberal construction to them. The act says that where by any accident or default whatever, no election shall be made on the charter day, they may proceed to an election another day, &c. According to these words, supposing the mayor had done wrong in making a voluntary adjournment, the wrong acts of officers were part of what was intended to be provided against by this act. It is objected, that the adjournment was made to between the hours of eight and nine, instead of ten and two; but this mention of hours in the statute is certainly

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who have a right to vote, or be present at, or to do any other act necessary to the compleating of, such election, are required to assemble in the *Town Hall* or usual place of meeting, on the day next after the expiration of the time within which such election ought to have been made, unless such day be *Sunday*, and then on *Monday* following, between ten in the morning and two in the afternoon, and proceed to the election of a mayor, &c. and do every act necessary to the compleating such election; and if upon such day of meeting hereby appointed, the mayor or other officer, who ought to have held the court, shall be absent, then such other person having a right to vote, being the nearest then present, shall hold the court and have the same power as belongs to the mayor, &c.



directory and not restrictive, and intended to prevent surprize by beginning at inconvenient times. Now as to what appears on this record, there is no pretence of surprize in the present case.

The next objection is, that the mayor whose office had expired the day before presided at this election; and did that appear on the face of the record, it would be a strong objection in favour of the prosecutor, but it does not; and therefore the whole matter not appearing upon this record, it ought to go again to trial, that if the jury should find a special verdict, the facts might come more fully before the court. As to the objection that it is pleaded to be an election, for the year next ensuing; this may be, as it were, a technical year, created by the act of parliament; as in corporations where the charter determines the office on a day after a moveable feast, the officers are nevertheless said to be chosen for a year. [16]

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries. Juries have a power by law to determine matters of fact only, and it is of the greatest consequence to the law of *England* and to the subject, that these powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the fact, and if ever they come to be confounded, it will prove the confusion and destruction of the law of *England*.

The other judges concurring in opinion with the Ch. J. a new trial was granted on the common rule of payment of costs.

*Rice vers. Kelly.*

ON a motion to set aside a bail given in before a judge, the plaintiff not having had notice of the bail, and that the defendant put in bail to the plaintiff's satisfaction, it was ruled, that leaving notice under the party's door is in no case sufficient notice; and that though notice should not be given to plaintiff of the bail, yet if after the bail is put in, he takes notice of it, and makes inquiry after the persons, and declares himself satisfied with them, it is the same thing, as if he had notice before. Bail.

*Holiday and others in several Suits vers.  
Pitt.*

THIS cause was argued in *B. R.* May 17, 1734, and again before eleven of the judges (Mr. Privilege of  
Parliament.  
Baron Carter being absent) in *Serjeants Inn*.

*The state of the case was as follows :*

A motion was made in *B. R.* to discharge the defendant *John Pitt*, esq. out of custody; because he having been member for *Camelford*, in *Cornwall*, in the late parliament, was arrested and detained in custody by several writs of *Capias* out of the *Common Pleas*, and *Latitats* out of *B. R.* within three days after the prorogation, and two days after the dissolution of parliament before the time of privilege, as he alleged, was expired. He was likewise charged in custody with several declarations. The defendant removed himself into *B. R.* by *Habeas Corpus*. The return was produced in court to shew that he was a member of parliament, and affidavit was made that

he continued sitting till the end of the parliament ; and the judges of *B. R.* having conferred with the rest of the judges, it was ordered to be argued again before them all.

*The Sum of the Arguments made use of by the* [17]  
*Counsel for the defendant was as follows :*

There are three principal points in question. First ; whether the defendant is intitled to any privilege *redeundo* after a dissolution, as well as after a prorogation, which was not disputed. 2dly, Supposing he has a privilege, whether it appears he was taken up within time of privilege. And 3dly, Whether he applies to the court in a proper manner in order to be discharged.

As to the first point, that members have some privilege *redeundo* after the dissolution of the parliament, was never before controverted. The reason that was the foundation of the privilege still subsists ; since it is but just that persons who have neglected their own private affairs for the public service, should be secure from arrests, till they return to their respective habitations, where they may better provide for the settling their affairs ; and that there is no difference between prorogations and dissolutions may appear from this, that prorogations are not of that great antiquity as parliaments ; two or three new parliaments being sometimes called within the space of one year, and there were very few prorogations before the time of *H. 8.* This privilege arises from prescription, and therefore must have been the custom in cases of dissolution which only is ancient enough whereon to found a prescription.

Lord *Coke* in his treatise of the court of parliament says, that prescription has made this privilege mani-

fest to all persons. In judge *Atkins's* argument about the power of parliament, p. 38. it is said, that there is a privilege both for coming to parliament and returning from it, laid down by prescription. The statute of 6 H. 8. c. 16. which enacts, that no member departs before the end of parliament without licence, under the penalty of forfeiting his wages, shews that they must have had a privilege of returning after the dissolution. By *Stat. 8 Hen. 6. c. 1.* it is enacted, that all clergymen called to convocation and their servants shall enjoy the same privilege in *coming, tarrying and returning* as members of parliament do, which shews that members have a privilege for returning. The *Stat. 35 Hen. 8. c. 11.* enacts, that members shall have wages for coming and returning, as well as during the sitting of the house. The *Charter of the Forest, c. 11.* extends the privilege, which nobles summoned to attend the king had to kill two deer in the forest upon their first coming, to their return likewise. The words are: *Quicumque archiepiscopus, episcopus, comes, vel baro veniens ad nos ad mandatum nostrum, transierit per forestam nostram, liceat ei capere unam bestiam vel duas per visum forestarii si præsens fuerit, sin autem, faciat cornari, ne videatur hoc furtive facere. Hoc idem liceat eis redeundo facere sicut prædictum est.* And in 4 *Inst.* 308. the words *veniens ad nos ad mandatum nostrum*, are expounded of the nobles coming to parliament. *Raft. Entr. fo. 664*, and the *Reg. fo. 192.* take notice of a writ *De feodo militis Parl.* in which are [18] the words, *pro expensis veniendo, morando, et exinde ad propria redeundo.* In 4 *Inst.* 46. it is said that the wages are due *veniendo, morando et exinde ad propria redeundo.* *Scobell\** says, p. 88. that members and

\* Memorials of the Method and Manner of Proceedings

their necessary servants have a privilege from arrests *eundo, morando, & redeundo*; and in p. 108 of the same book, it is mentioned that one Mr. *Martin* a member of the house of commons was taken up twenty days before the meeting of the parliament, and discharged by order of the house, and that they came to a resolution that the house was privileged from arrests for a convenient time, both before the meeting and after the dissolution of the parliament. It is clear that such privilege has always been allowed, and a case is mentioned in *Scobell*, p. 104, of Sir *Thomas Shirley*, a member, who was taken up four days before the meeting of parliament, and was discharged, and the house came to the same resolution as in the former case. And indeed, as the house of commons had always avoided fixing any number of days for the duration of their privilege, lest they might seem to curb the same, it was difficult to say exactly to what time it extends, but that they only insist upon a convenient time. The peers indeed have by an order of the house settled their privilege to 20 days before and 20 days after. In a preface to a treatise concerning the antiquity of parliament, written by Mr. justice *Dodderidge* and others, there is mention made of a member of the commons, who falling sick, just before the rising of the house, and continuing so for some time, was arrested about six weeks after, and allowed his privilege. In *Scobell's* book above mentioned p. 110,

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in Parliament in passing Bills. Together with several Rules & Customs, which by long and constant practice have obtained the name of Orders of the House. Gathered by Observation, and out of the Journal Books from the time of Edward 6. By H. S. Esq. C.P. London printed in the year 1670 (1 vol. 12mo.)

it is said to have been laid down by the house in 1640, that every member has a privilege of 15 days before, and the like time after the sitting of the parliament. The case of *Thorpe* the speaker,\* arrested in the time of *Hen. 6.* (an. 31) which was so strongly insisted upon by the other side, in the argument in *B. R.* is taken notice of in *Moore* 340. and it is said to be during the interval of parliament; but it is not mentioned how long it must be in that interval. Besides *Thorpe* was arrested at the suit of the duke of *York*. In 1 *Brownlow* 91, a privilege of 40 days is alleged and not denied, though indeed the court gave judgment against the defendant, but it was upon another point.

In 2 *Lev. 72.* in the case of the earl of *Athol* and earl of *Derby*, it is said that some lords being consulted said that they insisted upon 20 days before and after, but that the commons had always claimed †

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\* Elfyng. The ancient Method and Manner of holding of Parliaments in England. (Lond. 12mo. 1660) pp. 194, 196.

† The earl of *Athol* having a decree against the earl of *Derby* for 7000*l.* the portion of his wife, who was sister to the earl of *Derby*; upon a question touching the privilege of peers in parliament, how long it lasted? The lord chancellor before he would grant a sequestration, sent to the lord *Hollis* and other lords to be informed in this matter; who hereupon sent him two orders of the house of lords, the one dated the 28th of *May* 1624, the other the 27th of *January* 1628. entred in the journal book of the house of lords; by which it appears, that they declare their privilege commences from the *teste* of their writ of summons to parliament; and that upon every session and prorogation their privilege is for twenty days before, and twenty days after each session, which the order says, is time enough for them to come from all parts of the realm, and to return. Hereupon the lord chancellor ordered the sequestration to be delivered and executed immediately after the twenty days: But it is said the commons never assent to this, but claim forty days after and before each session. 2 *Lev. 72.*

40. The same thing is said in 1 *Sid.* 29. There never was a doubt, but that a member being taken upon *Mefne Procefs* had a right to privilege; though it was sometimes a question, where he was taken on an execution, lest the debt might be lost; but it is now settled that privilege lies even in those cases. *Moor* 57. *Latch* 48. Even witnesses, juries, and barristers at law have a privilege *cundo et redeundo*, to and from the courts where their attendance is required. And in *Rafsal's Entries* 158, there is a writ for discharging, even the servant of a jurymen. And it is much more reasonable that a person attending the high court of parliament, should have this privilege, than one attending the lower courts of justice. The statute 12 & 13 *Will.* 3. c. 3. takes notice of this privilege of freedom from arrests, and makes no distinction between a prorogation and a dissolution. [19]

As to the second point; it cannot be supposed that the convenient time for freedom from arrests was expired in the present case; since the parliament was prorogued only the 17th, dissolved the 18th, and the defendant was taken up the 20th of *April*, and it cannot be supposed that three days are a convenient time for returning into the remotest parts of the kingdom, for which this gentleman served, and where his habitation must be supposed to be, and all his concerns, papers and vouchers lie. Neither can he be imagined to have settled his affairs in town in so short a time as the space of two days. The privilege of the high court of parliament ought not to be restrained in so strict a manner as that of a witness *subpœnaed* to attend a court of justice; but yet even in the case of a witness it has been determined, that a small deviation from the road shall not be a forfeiture of his privilege, as he may do it to provide suf-

tenance or a horse for his journey. *Bro. Ab., Privilege 4.* And it was adjudged *Trin. 13 Ann.* in the case of *Hatch and Blisset*,\* where a witness who had given his evidence at the assizes at *Winchester* was arrested in that town the day after, that so small a delay was no forfeiture of his privilege.

As to the third point; this application for relief is made in a proper manner; as of late years many things have been done by motion in court for the expedition of justice, which were formerly required to be transacted with greater solemnity. In many cases where parties were formerly put to bring their *Audita Querela*, they are now relieved on motion. Persons arrested on a *Sunday*, and ambassadors servants are discharged on motion. A Person arrested on a *Sunday* contrary to the *Stat. 29 Car. 2. c. 7.* would no doubt be discharged on motion. So was the witness in the above mentioned case of *Hatch and Blisset*. According to 1 *Sid. 42.* Sir *Richard Temple* defendant in a trial at bar in *C. B.* moved that court to put off the trial, he being chosen a member in the ensuing parliament, and there was no objection made that it could not be done in a summary way; but the court required a certificate of his being a member in that case. In the present case the return is laid before the court, and all the satisfaction given of his being a member that it can receive: The necessity of the thing requires it to be done in a summary way; since very great inconveniencies will attend the determining it in the manner of a plea; for the defendant must remain in custody a long time before it can be tried, which will elude the lawful privilege, and bring him into the same difficulties which that was

\* Gilbert Rep. K. B. 308.



established to prevent. It is true, indeed, that no precedent can be shewn of a member of parliament being discharged upon motion, but that must be because no one was ever before so hardy, as to arrest a person intitled to privilege of parliament, in so short a time after the dissolution.

*Argument of the Counsel for the plaintiffs.*

As to the first point, viz. whether the defendant is intitled to privilege after dissolution; a case has been cited, which ascertains the privilege of peers, but as to that of the house of commons, there was such variety in the cases cited, such uncertainty in the time limited, that they could by no means be sufficient grounds, whereon to found a legal prescription. It is apprehended there remains no privilege from arrests after a dissolution; since the reason which first served for creating it ceases, as there is no further trust reposed in the members, nor has the public any further concern or interest in the security of the persons of those who were before their representatives; and *cessante causa, cessat effectus*. Privileges of this nature ought not to be favoured nor extended, as they hinder the subject from recovering his natural right. Prorogations are much more ancient than the time of *Hen. 8.* as may be seen by the titles of several statutes made before that time. The uniform language of the books is, that privilege is allowed *pendente parlamento*, and *sedente curia*. *Coke 4 Inst. 48. Dy. 60. Bro. Ab., Privilege, pl. 66. Cotton's Records 596, 701 & 704.* In *Sir Robert Atkins's Parliamentary and Political Tracts* 42. a writ is mentioned that the members, *dum sic in parliamentis nostris morentur arrestari aut implacitari minime debeant, &c.* The judgment on that same writ has the same words; and in *Hakewell's Modus Tenendi Parl.* 63.

it is said that the parliament does not allow a privilege from arrests *tempore vacationis sed tantum sedente Curia*. The same book mentions that *Thorpe* speaker of the lower house in the time of *Hen. 6.* was taken in execution in time of vacation, and the house on their meeting presented a petition to the king and house of lords that their speaker might be restored to them, and the judges being asked their opinions, the [21] speaker was not returned, but a new one chosen.\* *Crompton* in his jurisdiction of courts (p. 11.) makes use of the same expression as *Hakewell*, that privilege is only allowed during the sitting of the house. In 4 *Inst.* 24. a writ is mentioned to be in the parliament roll,

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\* The truth of this was, that the judges avoided giving any opinion in it; for that the determination of the privilege of parliament belonged only to the parliament; as appears from 13 Co. 63. The words are: "another parliament in 31 H. 6. which parliament began the 6th of *March*, and after it had continued some time, it was prorogued until the 14th of *February*: And afterwards in *Michaelmas* term Anno 31 H. 6. *Thomas Thorp*, the speaker of the house of commons, at the suit of the duke of *Buckingham*, was condemned in the *Exchequer* in 1000*l.* damages for a trespass done to him: The 14th of *February*, the commons moved in the upper house, that their speaker might be set at liberty, to exercise his place: The lords refer this case to the judges; and *Fortescue* and *Prifot*, the two chief justices, in the name of all the judges, after sad consideration and mature deliberation had amongst them, answered and said, that they ought not to answer to this question; for it hath not been used aforetime that the justices should in any wise determine the privilege of this high court of parliament; for it is so high and mighty in its nature, that it may make laws; and that, *that* is law, it may make no law: And the determination and knowledge of that privilege belongeth to the lords of the parliament, and not to the justices: But as for proceedings in the lower courts in such cases, they delivered their opinions. And in 12 E. 4. 2. in Sir *John Paston's* case it is holden, that every court shall determine and decide the privileges and customs of the same court, &c."

that members shall not be arrested *quamdiu parliamentum duraverit*. 1 *Brownlow* 91. is an argument against the defendant rather than for him, since it was given against the person alleging his privilege. The case cited from 2 *Lev.* 72. is the case of a peer. The statute of 6 *Hen.* 8. 16. which has been mentioned, can only shew that members were intitled to privilege during the session of parliament, and while wages were allowed. It cannot be said that they claimed it 40 days before, and 40 days after the sitting of the parliament; for in 4 *Inst.* 46. mention is made of a writ directed to a corporation to pay their burgessees their wages; whereby it appears that the whole allowance given *cundo*, *morando*, and *redeundo* during the sessions, *viz.* for 21 days, was four shillings a day. There is a case mentioned in the same book, that a parliament being called and dissolved by the king's death, just before the sitting, it was doubted whether the members were intitled to any wages at all; and it was put upon this, that some precedent should be shewn for it; but it does not appear that any one was found. And if no precedent can be shewn for privilege after the dissolution, it is a strong presumption there is none.

As to the second point, *viz.* that he should have a privilege for a convenient time to return; he has not set forth in his affidavit, that he was returning, or even preparing to return to his proper habitation; but our affidavits swear that his constant habitation for two years last past has been within four miles of *London*, so that three days was above a convenient time; and it is plain he did not use that legal diligence in returning that he ought to have done; so that it lies wholly at the discretion of the court, whether they will discharge him or not. Witnesses attending a trial have the same [22]

privilege from arrests as members of parliament, and yet no precedents can be produced in which a longer time was ever allowed for their stay, after they had given their evidence, than till the day after. The case in *Brooke*, which says a small deviation shall be no forfeiture of privilege of a witness, is a strong argument that a great deviation shall.

As to the third point ; as no case has been cited, in which a member of parliament has been discharged on motion, it is a strong presumption no such thing ever was done. He ought either to have brought his writ of privilege, or to have pleaded it. In *Dyer* 60. in the case of a member of parliament taken in execution, a writ of privilege is mentioned as a proper remedy. Sir *Hen. Finch* speaker of the house of commons wrote a letter to the court of *King's Bench* upon the arresting of a member of parliament, certifying that he was intitled to privilege, in order to his discharge ; but the court would not allow it, for that a special *Superfedeas* ought to be issued out reciting his privilege. *Latch* 48. In the case of Sir *Richard Temple*, in *Sid.* 42. cited by the other side, the court would not grant his motion, as he only made affidavit of his being a member, and demanded why he could not bring his writ of privilege. 1 *Salk.* 511. A peer being arrested, insisted on being discharged on motion, but the court were of opinion they could not do it. The reason why witnesses and barristers at law are discharged from arrests upon motion is because it is a contempt of the court on which they attend ; and it is commonly done by judges of *nisi prius*, and not by the court from whence the *Process* issues. Ambassadors servants are discharged on motion, because the *Stat. 7 Ann. c. 12.* expressly enacts that all *Process*

against them shall be void. The *Stat. of 1 Geo. 2. c. 14.* which privileges seamen from arrests in suits under such a sum, impowers the court to discharge them on motion. The same provision there is in the act against mutiny and desertion, which shews it to be the opinion of the legislature, that they could not be relieved on motion without that clause. A writ of privilege is an expeditious way which can cause no failure of justice. Attornies are never discharged on motion. 1 *Salk. 544.* An attorney of the *C. B.* sued in *B. R.* applying to the court for a discharge by way of motion, was ordered to bring his writ of privilege.

Lastly, it is submitted to the judgment of the court, whether or not the defendant by removing himself into *B. R.* by *Habeas Corpus*, has not submitted to the jurisdiction of the court, and is not become a prisoner by his own voluntary act. In *Dyer* 336, pl. 18. a clerk in *Chancery* was taken in execution in *C. B.* he sued out a *Superfedeas* to the sheriff *quia executio improvidè emanavit*, and afterwards sued out his writ of privilege, but the court disallowed it; because they were possessed of his plea, coming from himself; but said, that had he not entered such a plea his privilege should have been allowed him. 2 *Roll. Abr. 69. Brooke title Privilege* 25. The clerk of the *Hanaper* was sued in the exchequer. He imparled and afterwards sued out his writ of privilege; but *per Tot. Cur.* he had lost the advantage of it, because he had imparled, and by that confessed the jurisdiction of the court. 1 *Sid. 29.* Lord *Ward* pleaded his writ of privilege after imparlance, and the court would not allow the plea. And with respect to some of the plaintiffs, the defendant was not arrested; he was only charged in custody with declarations. [23]

The counsel for the defendant replied, that the acts of parliament cited, which allowed of application to court by motion, shewed the reasonableness of the thing. To the objections, that bringing the *Habeas Corpus* was a waiver of the defendant's privilege, and that he was not arrested by some of the plaintiffs; it was answered, that he had neither pleaded nor imparled, whereby to admit the jurisdiction of the court. He was taken and detained by several *Capias's* out of the *C. B.* and two *Latitats* of *B. R.* before the charging him in custody with declarations; and therefore if the arrests appear to be illegal, the declarations must fall likewise, as being grafted on a wrong. He was taken on these writs before the bringing of the *Habeas Corpus*; and it can never be interpreted that removing ones self from a worse prison to a better, is a surrender of ones self into custody: nothing is more common than for persons under illegal arrests to sue out this writ in order to their being discharged.

*May 27.* Lord *Hardwicke* *C. J.* delivered in *B. R.* as the unanimous opinion of the eleven judges who were present at the hearing, that the defendant was intitled to the privilege of parliament *redeundo*; that it was not necessary in this case to determine to what precise time it was limited; for supposing it to be only for a convenient time, the defendant was arrested within that convenient time; he having been taken within three days after the prorogation, and two after the dissolution of the parliament, and that consequently his person ought to be discharged in a proper and legal manner: But that the remaining question is, what is that proper and legal method, whether by writ of privilege under the great seal upon record, or whether it may be done by motion upon affidavit.

As to this point the judges are all of opinion, that a writ of privilege is a proper method to be taken for the discharge of the defendant's person. But there was a great doubt and some variety of opinion amongst them, whether the court could discharge him in the method now taken upon a motion or not ; no case having been produced from the books wherein any person intitled to the privilege of parliament was discharged in this manner. But this being a matter of great consequence, and the short time between the hearing and the last day of the term being taken up in necessary business, the court was of opinion to enlarge the rule till next term without prejudice to the defendant's bringing his writ of privilege, and if the defendant does not think fit to bring his writ of privilege in the mean time, but insists on the method already taken, they will then give their opinion upon the matter after having given it the consideration it will require, it being altogether a new proceeding. [24]

*Trin. 8 Geo. 2.* The defendant petitioned in *Chancery* pursuant to the opinion of the judges for a writ of privilege directed to the justices of *B. R.* to discharge the defendant out of the custody of the marshal of that court. The lord chancellor *Talbot* ordered this matter to be moved in court, and took to him the assistance of the master of the rolls. But the affidavits of notice to the several plaintiffs not being sufficient, the matter was adjourned. And the lord chancellor took notice that the writ which the defendant prayed was drawn up in order to discharge him not only from the suits recited in the writ, but from all others whatsoever, whereas he might be charged at other suits than those in *B. R.* 2dly, His lordship observed, that the form of the writ which they prayed was varied from the common

form; that they had recited that members of parliament had a privilege of returning, but as to their own case, only said that the defendant was preparing to return; that the writ recited only that he having been arrested was since charged with several declarations, whereas it might be material to mention the several times that he was charged with each; for that he might be charged with some since the time of privilege, and that it would be matter of very different consideration, and very doubtful, whether or not those with which he was charged after the time of privilege, ought to be superseded. His lordship added that this was a question of as great nicety as perhaps ever was moved.

The master of the *Rolls* asked the counsel for the defendant, whether they took this remedial writ to be in the nature of an original or judicial writ; they answered in the nature of an original; whereupon the master of the *Rolls* told them they must then look for it in the *Register*, or else consider whether the *Stat. of Westminster 2.* which gives a writ *in consimili casu* extends to the present case.

The counsel for the defendant finding these difficulties arise as to the obtaining a writ of privilege applied to the court of *B. R.* for the opinion of the twelve judges upon the point, which remained undetermined, *viz.* whether the defendant could properly be discharged by motion.

The twelve judges met again in order to take this point into consideration; Mr. Baron *Carter* who was absent from the former argument being then present; and on *July 3, 1734.* Lord *Hardwicke* declared in *B. R.* that by the opinion of ten of the judges against two, the defendant, as the law now stands, is proper to be discharged on motion.



The two judges who dissented were the Lord Chief Baron *Reynolds* and Mr. Baron *Thompson*; the former was only doubtful whether it could be lawfully done or not; the latter was more inclined to a positive opinion, that it could not be done.

The main points on which the ten judges founded their opinion, are as follow.

There are two considerations in the present case; [25] first how the law stood as to this point of discharging on motion before the statute 12 & 13 *W. 3. c. 3.* And 2dly, Whether that statute has made any alteration in the law, as to this point, and what alteration.

As to the first, all the judges of *England* are of opinion, that before the statute of *W. 3.* the regular method to be taken by a member of parliament arrested within the time of privilege, in order to be discharged by the courts of *Westminster*, was to sue out a writ of privilege. That writ was a *Superfedeas* to the action. It might be, and generally was pleaded as a *Superfedeas*, and in the instances in which the privilege of parliament has been pleaded, the judgment of the court is prayed, *si curia cognoscere velit & debeat*. In *Prynne's Register of Parliamentary Writs*, there is a chapter concerning this matter, p. 660. and though his reasoning is not quite right, yet it is a very useful collection, for he has printed *verbatim* most of the records relating to this purpose. Thus the matter stood at Common Law.

As to the second consideration, whether the statute 12 & 13 *W. 3. c. 3.* has made any alteration in the law, as to the matter of discharging; ten judges are of opinion that it has made two alterations. First, that it has taken away the old plea to the jurisdiction of the court; and 2dly, That it has

made it illegal to arrest the Body of any person having privilege of parliament.

As to the first, it enacts that any person may commence and prosecute any suit against any peer of this realm, or member of the house of commons, from and after the dissolution or prorogation of parliament, and from any adjournment for above fourteen days till a new parliament shall meet, or the same reassemble; any privilege to the contrary notwithstanding. The intention of this clause is only to abridge the privilege of parliament. Then follows a proviso, that this shall not extend to the subjecting the persons of members having privilege, to arrests. And then is an enacting clause, that any person shall have such process out of any court of record against persons having privilege of parliament, as they might out of time of privilege; and then it concludes negatively in this manner, *but shall not arrest or imprison the body of any knight, burghers, &c.* during the continuance of privilege. The consequence of this act is, that it has made it lawful to proceed against any member after prorogation, and during time of privilege. Therefore they cannot plead to the jurisdiction, whether the court ought to proceed in the action; since by this act an apparent jurisdiction is given; nor can they plead in avoidance of the writ or process of *Capias* or *Latitat*; for that would be only in abatement; nor is there any instance of such a plea, if not given by act of parliament. In the case of *Widdrington and Charlton, Hill. 11 Ann. (10 Mod. 86.)* where a man was brought in on an appeal by erroneous process, it was determined, that as it was only to bring him in, he could not plead to the process, though he might to [26] the jurisdiction or action; therefore since by this law

persons intitled to privilege of parliament cannot have the old plea to the jurisdiction, the question is, how they can take advantage of this privilege. And the ten judges are of opinion that it may be done by motion, and more especially upon this ground, that the act has now made the execution of this process by arrest of the body irregular and illegal. This act has done two things; first it has enacted a new method of proceeding against persons having privilege of parliament by summons, attachment, and distress infinite, &c. 2dly, It has enacted that no person having privilege shall be arrested or imprisoned. These last, which are negative words, have made this privilege part of a general act of parliament, of which the courts of law must take due notice, and therefore do not necessarily want this privilege to be certified to them by writs, as they did formerly. At that time this privilege was only founded upon usage, but now it is part of a general statute. But though the courts of law take notice of the privilege, they can take no notice of the person of the member till it be made appear to them; and this is properly done by the return as it was in the present case. In *Sir Richard Temple's* case, reported in *Sid. 42. Raym. 12. c. 1. Keble 3, 13, 16.* the court told *Sir Richard*, he must either produce his return, or plead his writ of privilege. *Salk. 511.* *Lord Banbury's* case, a *Latitat* was taken out against him by the name of *Charles Knollys, esq.* and the court said that they would have discharged him on motion had the writ run in the name of *Lord*; and *Holt C. J.* further added, that had his lordship ever been called to parliament, the court would have discharged him on motion. This imports that had any matter of record been shewn it might

have been done on motion. Therefore it now appearing by matter of record, as the return of the writ is, that the defendant was a member of parliament at the time of the arrest, it is brought to the case of a person arrested in an illegal manner; and may be compared to the case of an arrest on a *Sunday*; there the party is never put to plead in avoidance of the writ, but is discharged on motion; as in the case of ambassadors servants, where, though in the act there is only a declaratory clause, that the process shall be void, yet the party is always given the most summary benefit of it by being discharged on motion; though the motion is never made to quash the process. Thus, as to the acts against frivolous and vexatious arrests, which enact that no person shall be arrested for a debt under 10*l*. by process issuing out of any superior court, and institute a new manner of proceeding by serving the defendant with copy of process; if a person is arrested the court discharges him on motion. On this consideration, the ten judges are of opinion, that since the statute 12 & 13 *W. 3. c. 3.* this is an illegal and irregular arrest, and therefore the defendant is proper to be discharged on motion; and that it is discretionary in the court to proceed either to discharge his person on a writ of privilege, if brought, or in the manner now taken: And this is but similar to other cases in the law, as where witnesses, jurors [27] or parties to suits are arrested. The privilege on which they are discharged, is the privilege of the court whereon they attend, and anciently writs of privilege issued out in these cases, a great number of which may be seen in *Rastall's Entries*; and though in these cases a writ of privilege may be brought; yet it is likewise the long established course, to dif-

charge them on motion. When this is done by the court on which they attend, it is as their own privilege, but when they are discharged by the superior court whence the process issued, it is by taking notice of the privilege of the courts below. In the case of *Hatch* and *Blisset* mentioned in the argument, the witness was not discharged by the judge of assize; but the next term a motion was made in *B. R.* to discharge him; and this court took notice of the privilege of the court of *nisi prius*, and this is as strong a case in point; as that privilege was not certified by any matter of record. And the ten judges are of opinion, that by putting this construction on the act of 12 & 13 *W. 3.* they make it the most remedial and easy to the party.

His lordship added, that as to the matters insisted upon as a waiver of the privilege, the court could not take notice of them; but they being by way of private contracts between the parties, if they are broken they must take their remedy another way. It has been generally held that no waiver of privilege is good, but under hand, nor was there ever known any waiver of privilege against the person, but only to give a power of suing. The court was of opinion, that there was no occasion for a *Superfedeas* in this case, as the marshal is an officer of the court, and therefore ordered a rule to be made for the discharge of the defendant out of custody upon filing common bail.

### *Evans vers. Bird.*

THE court granted leave to execute a writ of inquiry before the chief justice at his sittings in *Middlesex*; it being against the sheriff's officer.

[28] *Rex vers. Justices of Peace of Surry.*

IN this case the court held that they could grant a *Mandamus* to the justices of peace, to grant an assignment of the prisoner's effects to the creditors, pursuant to the statute 2 Geo. 2. but that a *Mandamus* will not lie to them to grant it to any particular person, because the act has left that to the justices discretion.

*Rex versus Justices of Shrewsbury.*

A *CERTIORARI* was moved for to remove a poor's rate made at the sessions; and the court granted *rule to shew cause*, because it was said this differed from the case of *Utoxeter* parish,\* be-

Poor's rate not to be removed.

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\* This case was in *E. 5 Geo. 2.* and is thus reported by Sir *John Strange*, p. 932. "Upon great debate, and search of precedents, it was held, that a *Certiorari* would not lie to remove the poor's rate itself, the remedy being to appeal, or by action when a distress is taken, which will answer all the end of justice in coming at an unequal rate; whereas if the rate itself should be required to be sent up, great inconveniences and delays would follow; and a case was cited *Mich. 10 Ann. Regina v. Inhab. de St. Mary the Virgin in Marlborough*, where it was so resolved." The same case is reported in a MS. as follows: Mr. *W.* moved for a *Certiorari* to remove a rate which was appealed from to the sessions. Mr. *A.* strongly opposed it, saying it was never done, and if it was removed it could be of no use. He cited 2 *Salk.* 483, 524. *Carth.* 464. *Hill. 7 Geo. 1. R. and Inhabitants of Bridgward.* *Hill. 3 Geo. 2. Rex and Inhabitants of Winfeinton.* *Mich. 7 Geo. and Rex and Inhabitants of Barnstable*; and he said that a rate is never made a record of the sessions, but is only used as an evidence; and if the rate be confirmed, it is always delivered back to the parish officer to collect his money. Mr. *F. contra* argued, that if this doctrine was allowed of, the justices would make

cause there the rate was made by the officers of the parish, from which they might have appealed to the sessions, whereas here the rate was made by the justices of peace at their sessions.

themselves absolute judges; and though they made an order confirming a rate, which was void in itself, yet this court would not be able to examine into it, and suppose this court should quash an order of sessions reversing a rate, then the rate would stand in force, when perhaps, could you see the rate, you would think it ought to be set aside.

*Lee Just.* If the rate be not good, the party has his remedy on a distress. The complaint is on the assessment, and the rate is only an evidence of that, and the act of the sessions has only a relation to the assessment, which, I believe, is always kept by the officer, not by the court.

*Page Just.* I cannot find out a distinction between a rate and an assessment; I apprehend they are the same.

*Ch. Just.* A *Certiorari* goes to remove the order, and for what? Why to see whether it be good or not, and how can we judge whether the rate be good or not, unless we see it. I have been for some time of opinion, that when a *Certiorari* goes to remove orders *cum omnibus ea tangen'*, every thing ought to be removed that may set the thing in a true light. I do not mean every matter of fact, for that is impossible; but how can we know whether this rate be good, unless it be returned.

*Probyn Just.* If a rate be void in itself, must there be no way of coming at it, and shall they levy money on a rate, which in itself is void? To what end is a *Certiorari* granted, if it can only remove the order, and that on which it is grounded cannot appear.

The whole court seemed to think the rate should be removed, but took time to consider of it, and look into precedents.

Afterwards this case was spoke to again; and *Lee Just.* cited a case from his notes, *Trin. 10 Ann. St. Mary's parish in Marlborough*, where a rule for a *Certiorari* to remove a rate was discharged merely for the inconvenience that might arise; and *Parker* then *Ch. Just.* said, they had better take their remedy by appeal or on the distress; and upon the authority of this case the rule granted in the case at bar was discharged.

- [29] This case coming on again, upon the rule to shew cause, Mr. S. said, that the chief reason why the *Certiorari* was denied to remove a poor's rate in the cases of the parishes of *Uxeter* and *Marlborough* was, because there the rates were made by the parish, and confirmed by two justices, from which an appeal lies; but that here the rate was made by the justices of appeal at their sessions, from whence there lies no appeal, and that there is a good deal of weight in the distinction; for that in the first case, the parties have a liberty and opportunity to be heard before the rate is final; whereas in this case, they have not. But *per cur.* Though that might be one reason for denying the motion in the cases cited, yet the principal reason was the inconveniency which would accrue to the poor from the dependency of the rate here; which might be for so long a time as to make them starve, and the same inconveniency will happen in this case as in the other; and if the rate be made without hearing proper parties, that is a proper matter for complaint, and therefore the motion was denied by discharging the rule.\*

*Rex versus Gibson.*

THE defendant being convicted on an indictment for forging a promissory note, his counsel would have moved for a new trial, though he was

Defendant after conviction must be in court to move for a new trial.

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\* In Sir *John Strange* 975. this case is reported thus: "Upon appeal to the sessions the poor's rate was quashed, and the sessions make a new one. To remove which I moved for a *Certiorari*, because here we could have no appeal, which was



not present in court himself; which the counsel for the king objected to, saying his presence was always necessary in criminal cases. The court was clear of opinion, that in criminal cases the party could not move in arrest of judgment, unless he was present in court, but doubted whether the same rule was to be observed in motions for a new trial. But after the court had taken a day to look into precedents, they held that the defendant ought to be in court as well when he moves for a new trial, as in arrest of judgment; and the chief justice said that the reason of it was, that the verdict had fixed such strong presumption of guilt on him, that the court will be sure of him, and commit him, if the verdict be confirmed; and for this he cited the following cases; *Rex v. Lunt, Wombwell & al. Mich. 7 Will. 3. Queen and Ridpath, Pas. 12 Ann.* And *Lee* Just. cited *Rex* and *Hayes*, [*Stran. 843.*] and some days after *Gibson* appeared in court, and the *posse* not being brought into court, the motion could not be made; but he was committed, and the court held that now they might dispense with his appearance at the day of the motion, which was done accordingly, and the motion for a new trial was, after [30] argument, denied.\*

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one reason given in the case of *Uttoxeter*. But the court said, that was not the only reason they went upon, and denied a *Certiorari*."

\* This case is thus reported in Sir *John Strange* 968. "The defendant was convicted of forgery, and would have moved for a new trial, without appearing in court; insisting that this differed from a motion in arrest of judgment. But the court held there was no difference; for the verdict fixes such a presumption of guilt, that the court will be sure of him, before they intimate any opinion: And even when the verdict was brought in would have committed him, had he staid in court. And the chief justice mentioned the case of *Regina v. Ridpath, Pas.*

Harris qui tam *versus* Reiny.

THIS was an action of debt brought in *London* against the defendant on statute 15 Car. 2. c. 8.\* for selling fat cattle alive, and motion was made to stay proceedings on it; because that no affidavit was made that the offence was committed in the county of *London*, where the action was brought pursuant to the statute† 21 Jac. 1. c. 4. §. 3. but after argument and consideration of the following cases, viz. *Rex and Gaul*, Salk. 372. *Carth.* 465. *S. P. Rex and Hickes*, Salk. 373. the court were of opinion, that the proceedings on the statute 15 Car. 2. were not restrained by 21 Jac. 1. for that the statute 21 Jac. 1. does not extend to any future statute which gives a particular manner of recovering a penalty for an offence, created after the making of the statute 21 Jac. 1. and therefore the rule given to shew cause why the proceedings should not be staid, was discharged.

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12 Ann. and *Rex v. Lunt et Wombwell*, in perjury, where the distinction now taken was overruled."

\* By statute 15 Car. 2. c. 8. §. 2. No person using the trade of a butcher shall sell, or expose to sale, any fat oxen, steers, runts, kine, heifers, calves, sheep or lambs alive, on pain to forfeit double the value of the cattle; one moiety to the king, and the other moiety to him that will sue.

† By statute 21 Jac. 1. c. 4. *sect.* 3. No officer shall receive any information, &c. upon penal statutes, until the informer hath first taken oath before some of the judges of that court, that the offence was not committed in any other county than where by the said information the same is supposed to have been, and that he believeth the offence was committed within a year before the information, within the same county.

*Hatcham and Buckleberry Parishes.*

Costs given on statute 5 Geo. 2. order of session being determined against the party, who removed it.

**M**R. K. endeavoured to shew cause why an order of removal made on an appeal by the session should not be confirmed, but not succeeding in it, Mr. H. immediately prayed that the court would order the costs to be taxed pursuant to statute 5 Geo. 2. c. 19. s. 2. which directs, that no *Certiorari* shall be granted to remove orders, unless the party enter into a recognizance of 50*l.* for the payment of full costs, to be taxed according to the course of that court, where the orders are confirmed. The court at first doubted, whether this ought not to be done by a distinct motion, but at last to avoid that expence, they adjudged the order should be confirmed, and that the parish should have the costs to be taxed by the master. [31]

*Rex versus Hestlop.*

Order of bastardy quashed for not setting out that one of the justices was of the *quorum*; but the reputed father was bound over to the next session.

**M**R. F. moved to quash an order of bastardy made by two justices of the peace of the borough of *Richmond* in *Yorkshire*, and objected (*inter alia*) that it does not appear that either of these justices are of the *Quorum* pursuant to statute 18 *Eliz. c. 3.* and cited *Rex* and *Davis, Trin. 1 Geo. 2.* where an order for discharging an apprentice from his master in the city of *Bristol*, was quashed for this exception. Rule was given to shew cause, and Mr. S. said, that *Richmond* being a borough, the statute 18 *Eliz.* did not extend to it, and therefore a *quorum* not necessary; for that in some boroughs there are no justices of the *quorum*, but that if it was required by that statute, the defect of it was aided by the statute 3 *Car. 1. c. 5.* but

the court held, that the statute 18 *Eliz.* requires a *quorum*, as well in boroughs as in counties, and for this fault the order was quashed; and they held likewise, that the statute *Car. 1.* did not aid it. However, they ordered the reputed father to be bound over to appear at the next sessions to be held in and for the borough of *Richmond*, and said, that it was so done in the case of *Queen and Murray, Mich. 3 Ann. Salk. 122. & Heslop's case.\**

*Rex versus Tyrer.*

**M**OTION for leave to withdraw a demurrer to an information in nature of a *Quo Warranto* against the defendant, as mayor, &c. and that the plaintiff might take judgment for want of a plea, being willing to save the expence of arguing it. But the chief justice said, that it could not be done but by consent; for that none can withdraw a demurrer but the crown, and therefore *per cur.* the motion was denied.

Demurrer cannot be withdrawn by defendant without consent of the prosecutor.

[32] *Day & al' versus Searl.*

**M**R. *M.* was to shew cause why a prohibition should not go to the court of admiralty to stop a suit there by mariners against the ship, called the *Recovery*, on suggestion, that they had entered into

Prohibition.

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\* This case is thus reported by Sir John Strange (974.) "An order of bastardy made by two justices of the borough of *Richmond* in *Yorkshire* was quashed for want of *quorum unus*: Though 3 *Car. 1. c. 5.* was insisted on, when justices in precincts have power to execute the 18 *Eliz. c. 3.* as justices in the county do; which *per curiam*, must be in the same manner. *Quaere tamen*, for many charters have no *quorum*."

an agreement and contract with their master for their wages under hand and seal, and said, according to the resolution in *Salk.* 33. that it is discretionary in the court, whether they will grant prohibitions in such cases or not; and that though the case of *Opy* and *Addison* in *Salk.* 31. seemed to be against him, yet that it was adjudged in 3 *Lev.* 60. that though there was a charter-party suggested, yet that a prohibition should not go to the admiralty court, and that the case of *Middleton* and *Scolly* is cited in that case, and said to be likewise so adjudged. That the statute 2 *Geo. 2. c. 36.* has expressly provided under a penalty of 5*l.* that all mariners shall enter into an agreement with their masters, and to be signed by them; and that the mariners are to be allowed to sue in the admiralty, because they go to sea on the confidence of the ship.

It was argued *contra*, that in this agreement it is suggested, the mariners have contracted with the master for several articles not mentioned in the act. They have covenanted against leaving the ship, or imbezeling any of the goods in the ship: that they will deduct their wages if they shall be found to be incapable of performing their proper services: that they will not put any goods of their own on board without the master's consent; and that they will not go on board to serve in any man of war, &c. The case in *Lev.* 60. does not shew that there was any agreement by the mariners with their master under *their* hands; for a charter-party is an agreement between the master and the owners only. Here is a contract by deed, which the admiralty cannot try; and this is like the case of *Opy* and *Addison*.

Ch. Just. In this case are two questions; first how the law stood before the making the statute of 2 *Geo. 2.* and 2dly, whether that act has made any

alteration in it. If this had been before the act I should think, if the contract between the master and mariners was different from that which they generally enter into, that in such case the mariners ought not to be suffered to sue for their wages in the admiralty court, because they sue there at all times by indulgence, and not from any original right. The suggestion here is of a deed of covenant under hand and seal between the mariners and the master. If it was a contract only signed between the mariners and the master, I should not think that was a sufficient foundation for a prohibition, because the statute 2 Geo. 2. obliges all masters and mariners to enter into such contract, and there is a proviso in *sect. 8.* that such contracts shall not alter the method of the mariners recovering their wages. But the present agreement is by deed under hand and seal, which is more than the act directs, and so not within the saving of the act, for that mentions only contracts under their hands, so that this case is *dehors* the act, and remains the same as it did before the making of the act, and like to the case of *Opy* and *Addison*. But there is another reason why a prohibition should go in this case, and that is because here the mariners have covenanted, that they will not go to serve on board any of the men of war, which is expressly contrary to the direction of the statute, and which they should not have entered into, and therefore on the general reason of the law, I think a prohibition ought to go.

[33]

The other justices spoke to the same effect, and therefore *per cur.* the prohibition was granted.\*

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\* This case is thus reported by Sir John Strange (968) "The mariners libelled on a contract under seal, and a prohibition was granted, on the authority of *Salk. 31. Vide 3 Lev. 60. contra.*"

Wainwright & al' *versus* Bagshaw & al'.

Prohibition on  
libel against  
churchwardens  
for not account-  
ing before the  
ordinary, when  
the accounts  
had been passed  
by the parish.

COUNSEL were to shew cause why no prohibition should go to the consistory court of the bishop of *Litchfield*, saying that this was a citation out of that court to the churchwardens of the parish of ——— to appear and give a true account of the money which they had received and expended upon the public account during the year of their office, 1731; and alleging that the former account was passed without proper notice to the inhabitants, and that there was a great deal of fraud in it. The churchwardens appeared and pleaded that they had passed their accounts in *August* 1732, according to law, and before the minister and the majority of the parishioners and inhabitants, and therefore ought not to go over them again: And they have now suggested for a prohibition on affidavit that this plea was refused.

It was argued, that the canon 89, made in the year 1603, required that the account should be passed within a month at the most, after the expiration of their office, and that these accounts appear not to be so done: And that here is a charge of fraud on them, and that will make their first account void.

It was argued *contra*, that the accounts are to be passed only for the sake of the minister and the parish; and if they or the major part of them are satisfied, it is sufficient: And if these accounts were improperly passed, the spiritual court should have accepted of the plea. And by supplemental allegations, they might have proved the fraud, if there had been any, and then the first account would have been void. In the case of *Haughton et al. versus Kendrick* in Scac.

[34] *P. 2 Geo. 2.* which was argued by civilians, there was the same suggestion as was here of fraud and collusion, and a prohibition was granted. *M. 1 Geo. 2. Nutkins and Robinson, S. P. Bunb. 247.* determined in *Scac.* by Ch. Baron *Pengelly. 2 Lut. 1028. S. P.*

Ch. Jus. The ordinary has power only to compel the churchwardens to account before the parish, and cannot take it himself; and therefore if there is no account passed, or a bad one, the application to the spiritual court, even by one parishioner, is sufficient. And if it appear there is no account passed, or a void one, they are to give sentence that the churchwardens account before the minister and the parish. It is objected, that this account was passed fraudulently; but the ecclesiastical court has nothing to do with that, if the parishioners will pass it so. The question is, whether here was a proper plea; and if it be not good in law, or, as they term it, admissible, (which is like our demurrer) and not relevant to the cause, they are not obliged to admit it. But this plea seems to me to be sufficient to a common intent, which is allowable here, and ought to be so there; and therefore I think the plea ought to have been admitted, and that a prohibition should go; for if the spiritual court should decree another account, and the parishioners should allow of the same, there could be no further application to the spiritual court, so that it appears such application is vain.\* The court granted the prohibition.

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\* This case is thus reported by Sir J. *Strange* (974.) "The churchwardens were cited into the court of *Litchfield* to account: They pleaded, that they had accounted at the vestry according to law; which was rejected: And a prohibition granted, for the ordinary is not to take the account; he can



*Burleigh versus Harris.\**

No writ of error  
*coram vobis* lies  
after affirmance.

THIS was an action brought in the *Marshalsea* court against a woman who pleaded *non assumpsit*, and gave her coverture in evidence; but judgment was given for the plaintiff, upon which she brought a writ of error here, and assigned the general errors, and judgment was affirmed; after which she brought here a writ of error *coram vobis* [35] *resident*. and assigned her coverture for error; upon which a rule was made to shew cause why the proceedings on this writ of error should not be staid; upon which Mr. S. to shew cause, said, that this was the same case with *Thompson* and *Lyons*, *Pasch.*

only give a judgment *quod computent*, and to what purpose should they be sent back to those who have taken their account already. The same rule was made in *scaccario*, *Pasch. 2 Geo. 2.* between *Haughton et al'*, churchwardens of *St. Alban, Woodstreet*, and *Kendrick et al'*; and in the case of the churchwardens of *HammerSmith*, *Mich. 1 Geo. 2. Nutkin v. Robinson*: And *vide Lutw. 1028.* And *Prideaux to Churchwardens 103.*"

\* This case is thus reported by Sir John Strange (975). "A judgment was recovered in the *Marshalsea*, and error brought in *B. R.* and error in law assigned, and the judgment affirmed: Then a writ of error *coram vobis* was brought, and error in fact assigned; and the court staid proceedings upon it, and gave leave to take out execution. For as error in fact and law cannot be both assigned on one writ, there is no reason to do it by a more dilatory method: And it is like the case of *Lambell v. Prettyjohn*, where it was held that error *coram vobis* would not lie after affirmance in the exchequer chamber; besides it would be very odd, that the same court should affirm and reverse. And as to the case in *Salk. 337.* where it is reported to lie after affirmance; that is not warranted by the record, which is entered *Hill. 3 & 4 Jac. 2. rot. 420.* by which it appears, the writ of error abated, and there was no affirmance; which is agreeable to 1 *Roll. Abr. 753.*"

4 Geo. 2. where such writ of error was allowed, and that the case of *Herne and Bushel*,\* Pasch. 6 Geo. 2.

\* This case is thus reported by Sir J. Strange (949.) "Error was brought of a judgment in the *Marshalsea* court, and error in law assigned, and the judgment affirmed. Then a writ of error *coram vobis*; which the court said could not be allowed without leave, and therefore held it no *Superfideas*." The same case is reported in a MS. in the following manner: An action was brought in the *Marshalsea* court against a woman who pleaded coverture, and after verdict, judgment was given for the plaintiff. A writ of error was brought in this court: The general errors were assigned, and the judgment was affirmed. The last term plaintiff in error brought another writ here *coram vobis resident*. and P. moved that this writ of error *coram vobis* should be set aside, and that the defendant in error might have liberty to take out execution. S. *contra*, cited the case of *Thompson and Lyons*, P. 4 Geo. 2. in this court, which was thus: There was an action in the *Marshalsea* against a woman who pleaded the general issue, and on the trial gave her coverture in evidence, but judgment was given against her, and then she brought a writ of error here, and assigned the general errors, and judgment was affirmed; upon which she brought a writ of error here *coram vobis resident*. and assigned her coverture for error; and on application to this court to set it aside, the court refused to do it. Now there was the same error assigned, which was found against her in the *Marshalsea* court; and we on our writ of error have not as yet assigned any error, but they move this on suggestion, *viz.* that we shall assign the coverture for error, but it is mere suggestion, for they cannot possibly tell what we shall assign for error. P. There is a plain difference between the case of *Thompson and Lyons*, and our case. Page J. There is so, for in the case cited, it cannot appear what was given in evidence, it not being in the record. But here is an error assigned of a fact which appears by the record of the plea to have been determined.—P. A writ of error *coram vobis resident*. does not lie in this court after a judgment given on a writ of error in this court. A writ of error *coram vobis* is of necessity when a judgment is originally given in this court; but when a writ of error is brought in the *Exchequer* chamber, and the writ of error is sent down here by a *remittitur*; it has been determined

was different from this, for there the coverture was specially pleaded, so that it must appear on record [36] that that matter had been already adjudged, whereas in this case it was only given in evidence.

Mr. P. cited *Salk.* 337. and *Lilly's Ent.* 278. to shew that *Salk.* was mistaken, and 1 *Vent.* 207. 2 *Lev.* 38. 3 *Keb.* 28, 29. *Hill.* 12 *Geo.* 1. *Lambell* and *Prettyjohn*.\* The court put it off for

that in such case a writ of error *coram vobis* does not lie here. So is 2 *Lev.* 38. 3. *Keb.* 28, 29. *Lambell* and *Prettyjohn*, *Hill.* 12 *Geo.* 1.—S. This is a case of consequence, and not fit to be determined on a motion; but that such error will lie here appears by these cases. *Salk.* 337. *Show.* 349. *Yelv.* 212.

*Lee J.* It does not appear what the error assigned in the case of *Thompson* and *Lyons* was, which is very material to be known; for a writ of error *coram vobis*, is to be allowed or rejected by the court as they think proper. In 1 *Vent.* 207, 208. it is expressly said, that a writ of error *coram vobis* shall be allowed by the court; and I apprehend the court has power to permit the defendant in error to take out execution in case they do not approve of the error assigned.

*Page J.* A writ of error *coram vobis* must be by direction of the court, and they will not grant it for delay: And if you do not shew us a sufficient reason to the contrary, we will hinder you from delaying defendant from taking out execution.

*Probyn J.* You must have leave of the court for a writ of error *coram vobis*, and if you do not shew us sufficient reason to grant it, we ought to allow of the motion.

*Curr.* Ordered the writ of error *coram vobis* to be set aside, and that the defendant might take out execution.

*Lee J.* cited the following cases, *Butler* and *Lustano*, *M.* 4 *Geo.* 2. 1. *Mod.* 285. 1 *Vent.* 31. *Carth. Warder* and *Stocow*, and said, that in the case of *Thompson* and *Lyons*, this point never came before the court.

\* This case is thus reported by Sir J. *Strange* (690.) "Judgment was given in *B. R.* in trespass, and on error in the *Exchequer* chamber the judgment was affirmed. The defendant then brought a writ of error *coram vobis* in *B. R.* which Mr. *Parker* moved to quash, and cited 1 *Ven.* 207. 2 *Lev.* 38.

a day to look into the case of *Thompson* and *Lyons*, and then the Ch. Just. said, that in that case there was a rule made to shew cause, why the assignment of errors should not be set aside, as appears by the rule itself, and that the irregularity of the writ of error itself never came in question by motion to quash it, or set it aside; so that the case at bar depends on the general rule of law, and I think there is no foundation to say that such writ will lie. As to *Salk*. 337. it was an error of a fine, and the record is printed in *Lilly's Entries* 278. and there it appears it was brought after abatement, and not affirmance of the writ of error. I think you can no more bring a writ of error *coram vobis resident*. in this court, after a judgment has been affirmed by a writ of error in the same court, than you can assign error of law and fact in the same writ, for either of them are equally grievous and dilatory; and if this was to be suffered, it would be every day practised; and therefore *per Cur.* the rule to set aside the proceedings on the writ of error was made absolute. But the Ch. Just. said, that they should move to quash the writ of error, and the court seemed to confirm the judgment given in *Horne* and *Bushe*, that such writ is no *Superfedeas* till an allowance from the court, because bail is not required to be given on it.

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3 *Keb.* 28, 29. that it will not lie after affirmance. *Belfield* serjeant insisted, the record never was removed from *B. R.* and that debt would still lie upon it. *Sed per curiam*, Before the statute of *Eliz.* we could not examine our own errors in fact after an affirmance in parliament: And the *Exchequer* chamber is now in the same degree with regard to us, as the parliament was before. The writ of error must be quashed."

*Rex versus Reffit.*

Indictment for  
extortion.

**T**HIS was an indictment against the defendant for extorting money, for examining, marking and sealing of small pots, by colour of his office as clerk of the market, and after verdict, Mr. *S.* moved in arrest of judgment, because it appears here that he is accused of taking a fee for that which he lawfully might do; for in the 4th *Inst.* 274. it is held, that a fee of one penny is due to the clerk of the market for marking and sealing of small pots, though nothing be due for examining them; and here the offence is laid in the copulative. But *per Cur.* we cannot take judicial notice of the quantum of the fee, which he has taken, for it is matter of evidence, and the jury has found that he took it by extortion; and of that he may be guilty by taking too much [37] even for marking and sealing, and gave judgment for the plaintiff.

*N.B.* In this case the *Ch. Just.* said, that though *Coke's Inst.* were good authorities as to matters of law, yet that they were no legal evidence of the historical facts mentioned in them, and that the same has been held as to *Camden's Britannia*, and such like books.

*Mr. George Anstis's case.*

No *Mandamus*  
lies to a devolu-  
tioner, if the de-  
volution comes  
to him as visitor  
of a college.

**M**R. *K.* moved for a *Mandamus* to be directed to the archbishop of *Canterbury* as devolutioner of *All Souls College* in *Oxford*, to admit Mr. *Anstis* to be a fellow of that college, he being the founder's kinsman in a direct line, as they could

prove by an unquestionable pedigree ; the statutes of that college ordering that such shall be admitted to be fellows there : And to prove it they produced a book of statutes which they owned was not examined with the original one, but they swore they believed it was a true copy, having it from one who was burser of the college ; and they said that they had often applied to the college to see the originals, but that they had been always denied ; and the court thought this was no such evidence as they could suffer to be read ; upon which there being no proper case laid before the court to grant such *Mandamus*, Mr. K. turned his motion into a prayer of having a rule given him upon the college, to inspect their public statutes, in order to lay a proper case before the court, and cited Sir *Edward Seymour's* case, where the deeds being in the hands of the adverse party, parole evidence of the person who had seen the deeds was admitted.

*Ch. Jusf.* We can never grant rules to inspect public books, &c. but when there is a matter depending on it in this court, and here you have laid none such before us : And though this case may happen to be hard on you, for that you are not able to lay a fit case before us until you have seen the statutes ; yet we cannot help it ; and it frequently happens that a man may have a right, and yet no remedy for it at Common law : And therefore if you have a right to be a fellow vested in you, I do not know why you may not have a bill of discovery in equity, though you cannot in this case pray relief there.

*Page J.* When you apply in a court of equity for a discovery of that without which you cannot come at a proper manner of shewing your right, your

prayer will be granted you ; but then you must shew yourself to be a proper person to pray such discovery. The court denied both the motions for the reasons above, and seemed agreed that a *Mandamus* will not lie to a devolutioner, where the devolution comes to him as visitor of the college, and that they ought not to be granted to execute the statutes of the college upon a private foundation, although *per Ch. Just.* such *Mandamus's* I think have been granted to colleges of a royal foundation by letters patents. But in that case, wherever it has appeared [38] that there was a visitor appointed, that has been always looked upon as sufficient to stop any proceedings on it.

### *Rex versus Lilly.*

Defendant cannot remove an indictment for perjury found at the *Old Baily*.

**M**R. *P.* moved for a *Certiorari* to remove an indictment found at the *Old Baily* for perjury on the behalf of the defendant. But the *Ch. Just.* said, that though the plaintiff might, yet the defendant could not remove such indictment ; and therefore *per Cur.* the motion was denied.

### *Hall versus Lawton.*

Full costs given though the damages are under 40*s.*

**T**HIS was an action of trespass by the master for beating his servant *per quod servitium amisit*, and damages were given under 40 shillings ; and Mr. *B.* now moved to have full costs in this case, for that this is a special action, and not an action of assault and battery within the statute 22 & 23 *Car. 2. c. 9.* as it is expressly held in *Salk. 206.* and *per Cur.* the

full costs were granted. He cited likewise, *T. 11 Geo. 1. Phillips and Fish. 8 Mod. 371.*

*Gillebrand versus Haddock.*

**M***R. H.* to shew cause, why a prohibition should not go to the consistory court of the bishop of *Carlisle*, to stay a suit there for the tithes of corn, (to which the defendant had pleaded that it was barren land) said, that they had not verified their plea by affidavit, and cited *Salk. 549.* But *Mr. S.* said, that in this case there was no occasion for it, for that the spiritual court could not try this matter, it being on the statute 2 & 3 *Ed. 6. c. 13.* He cited 2 *Roll. Abr. 304. 1 Keb. 253. and per Cur.* the prohibition was granted. Prohibition.

*Caswell versus Norman.*

**A** *Devastavit* was returned against an executor, and a general judgment given against him, upon which he brought a writ of error, and the judgment was affirmed; and *Mr. P.* moved that the master might be ordered to tax costs in this case. And after argument it was granted; for *per Ch. Jus.* in all cases where a defendant is executor, the law has determined that he shall pay costs, though it has been always held otherwise, where he is plaintiff; though I never found out the reason why he should not pay in both. But in this case he was defendant in the original action, and consequently chargeable with costs; and therefore I think the writ of error ought to be attended with the same conditions with the original action.



Dominus Rex, v. Ellames. *Stran.* 976. [39]  
S. C.

Defendant's plea to a *quo warranto* information, amended after demurrer, and cause in the paper; it appearing by affidavit that the omission was owing to the oversight of counsel.

A Motion was made on the part of the defendant, for liberty to amend his plea, after joinder in demurrer, and the cause set down in the paper to be argued. An information in the nature of a *quo warranto*, was brought against the defendant, to shew by what authority he took upon himself to act as mayor of *Chester*. By the charter of the City granted them by *Hen. 7.* all the citizens, inhabiting in the city, suburbs, and hamlets, thereof, have a power to nominate two persons, out of whom the court of aldermen choose one for mayor. The defendant, in his plea, after reciting this part of the charter, set forth, that he was nominated by the major part of the citizens, without adding, *inhabiting in the city, &c.* so that the plea might comprehend not only the resident, but also foreign burgesses, who had no right to vote in choosing the mayor. The prosecutor joined issue as to part, and likewise demurred as to the rest; and the defendant joined in demurrer: and the cause being set down in the paper, the defendant moves to amend his plea, and to make it conformable to the charter. Affidavits were read that the plea was not put in in the manner it was, purposely to gain time, but that it was merely a mistake of the counsel.

The prosecutors now shew cause why it should not be amended. There were a great number of cases cited on the motion; but they are all taken notice of by one side or other, in the present Argument.

*Mr. Abney, Mr. Parker, Mr. Crowle, and others,* shewed cause against the amendment; and argued,

that in amendments the court has always gone by some one of the following rules: either that there be something to amend by, or that the fault arises merely from the misprision of the clerk, that no trial be lost. Another rule is, where the defendant wilfully pleads a bad plea, in order to injure the plaintiff; the court will amend it on prayer of the party injured. Another rule is, where the action would be otherwise lost; but the present case has none of these requisites. That among all the cases cited by the other side upon the motion, in order to justify this amendment, there were not above two concerning informations in the nature of a *quo warranto*, and most of them were civil cases, not in the least partaking of a criminal nature; and therefore not applicable to the present case. That they may easily be distinguished from the present case, they are as follow:

[40] The first case was, that of the King and Sir Humphry Tufston, and Sir John Abley, *Cro. Car.* 144, on an information in the nature of a *quo warranto*, wherein the entry of a judgment was amended. The case was this: judgment by disclaimer, as to one charter, was entered by consent; but the clerk entering the judgment, had made the disclaimer general; however, as the paper books were otherwise fairly wrote, and the attorney general certified it to be a mistake, and consented to the amendment, the court said it was merely a misprision of the Clerk, and likened it to a special verdict, which may be certified by the minutes of the clerk of assize; but the present case is extravagantly different, as there is no consent, no misprision of the clerk, nor any thing to amend by. In *Jones (Will.)* 199, *Forger v. Sales* it is laid down as a rule, that the misprision of the clerk shall not hurt the party, but that the errors of

counsel cannot be amended. That in the case of the *Queen* and *Symonds, Hill. 12 Anne*, where an information for perjury was amended after it had been filed, by the affidavits whereon the rule was made, there was sufficient matter to amend by. The case of the *King* and *Hayes, East. 1 Geo. 2.* (lord *Raym.* 1518. *Stran.* 843.) is cited by them as a strong case, where on an indictment for forgery, after trial and a special verdict, a variance between the bond forged and the indictment, was amended; but that was done at the prayer of the counsel for the king, who observed that the defendant had made a wilful blunder, in removing the cause by *Certiorari*, in order to get clear by arrest of judgment, and therefore it was amended according to the original indictment, which was right. They also cited the case of *Foot* and *Prouse, Pasc. 12 Geo. 1., Stran.* 697. in an action for a false return to a *Mandamus*, the plaintiff declared against the defendant, by the name of *Pous*, and after *misnomer* pleaded, leave was given to amend the declaration; but this was a civil suit. In the case of *Crockatt* and *Jones, Stran.* 734. *Mich. 13 Geo. 1.* leave was given to add continuances in the record; but that was by the continuances on the roll, and also was a civil cause. The case cited from 3 *Lev.* 347, was an action against the hundred for a robbery, and the amendment there was given for a special reason; for had the plaintiff been to discontinue, the action had been lost, as the *Stat. 27 Eliz. c. 13. s. 9.* orders it to be prosecuted within a year. So in the case of the dukes of *Marlborough* and *Wigmore, (Fitz. Gib. 193.)* where the plaintiff declared only that the defendant was indebted to the duke in his life time, and after joinder in demurrer, the court granted liberty to amend, by inserting, that he was since in-

debted to his executors; for the plaintiff must have otherwise lost her debt, for the *Stat. of limitations* would have taken place. In the case of *King and Charlesworth*, Trin. 4 Geo. 2. [*Stran.* 871.] an information for forgery was amended after the record drawn and made agreeable to the affidavits, on which the rule was made; there being something to amend by; and being a criminal suit, it would have been wholly lost without it. As to the case so strongly insisted upon, of the *King and Hughes*, which was an information in the nature of a *quo warranto* against the defendant, for acting as mayor of *Liverpool*; and [41] the defendant said in his plea, that he was sworn before a wrong person, and the record had gone down to trial, but was brought up again, and leave given to amend by lord *Raymond*, after a long argument at his chambers; that was only the opinion of a single judge, and was also on condition that the trial should not thereby be delayed.

That in *Bearecroft's* case, cited from 3 *Lev.* 347. the plaintiff lost his own trial; as was done also in the case of *Chisley and Becket*, cited in the foregoing case, which was an action for a false return of a member of parliament, on the *Stat. of Hen.* 6. The plaintiff declared of an election by the mayor, bailiffs, and burgeses, instead of the mayor, bailiffs, burgeses, and freemen, of *Bedford*; and the court gave liberty to amend after the record had gone down to trial. That the defendant had drawn an argument from 9 *Anne*, c. 20. s. 7. that as that act extends the statutes of jeofails to informations, in the nature of a *quo warranto*, it must be from thence intended that they are civil suits; but the contrary is plain from thence, that there was need of an express clause to that purpose; and the fine set in a *quo warranto* shews it no civil suit. That this pro-

ceeding would evade the said *Stat. 9 Ann.* which was partly made in order to try the right of annual officers within the year. That here is a trial lost, for though the array may possibly have been challenged, had the trial come on; yet as an assize had slipt over, the court would intend this trial lost. In the case of Sir *John Pool*, *Poph.* 128. three executors brought an action of debt; one only declared; and when the cause was ready for trial, it was moved to amend the declaration, by inserting the names of the other executors; but denied; for that it could not be done without consent. In the case of the *King* and Sir *Henry Glemham*, *Poph.* 144. in an information in the nature of a *quo warranto*, the attorney general, after three years, withdrew his replication, and put in a new one; whereupon the defendant moved to plead in bar *de novo*; but denied by the court. In the case of *The Attorney General*, and the *Corporation of Trinity House*, in an information in the nature of a *quo warranto*, *Sid.* 54. the defendants had liberty to amend their plea before the joinder in demurrer; but it is there said that had they joined in demurrer, it would not have been granted.

Mr. *Huffey*, Mr. *Brooke*, Mr. *Strange*, Mr. *Noel*, Mr. *Taylor*, and others, for the amendment, argued, that as to the cases cited from *Popham*, by the other side, one, where the executor desired to amend by adding the names of the others; that would really be making it a new action, and the plaintiff might as well have discontinued; which cannot be done in the present case. That as to the case wherein the Attorney general put in a new replication, there was no reason why the defendant should plead *de novo*; since the plea, being precedent to the replication, could not be affected by the alteration of it. That a very

[42]

slight, or no answer, had been given to all the cases, and that there remain many more not spoken to. That the case of *Mostyn and Tottin*, in the *Exchequer*, 3 Geo. 2. is a stronger case than the present. It was an action on the case for the damage done by the smoke of a smelting house. There was a demurrer to the declaration by a country counsel. There was a joinder in demurrer, and the trial lost; and after the cause was set down to be argued, there was an application to the court to withdraw the demurrer, and plead to issue; and it was granted; because it seemed that the defendant might have a good plea upon the merits. 2 *Saund.* 401. 1 *Vent.* 221. 3 *Keb.* 61. In trespass for breaking the plaintiff's close, the defendant pleaded that his corn was upon the close, and that he entered to take it off. There was a demurrer, and on an argument from the paper, the whole court were of opinion, that the plea was bad; since the defendant should have shewn title to the corn; otherwise it would be presumed to be the corn of the plaintiff, as being on his ground; but nevertheless leave was given to amend. In the case of *Brownjohn and Doyley*, *Hill.* 8 *Ann.* [cited in *Stran.* 846.] the defendant in replevin avowed the taking for rent reserved on a lease for years, made 1707, instead of 1708; and after joinder in demurrer, leave was given to amend. In the case of *Lord Gage and Robinson*, in a declaration in replevin, the *locus in quo* was mistaken, and the defendant pleaded that the place of the taking was elsewhere; and yet the plaintiff had liberty to amend. The case of *Garner and Anderson*, 3 Geo. 1., *Stran.* 11. is a parallel case. In the case of the *duchess of Marlborough and Widmore*,\* there was nothing to amend by. That num-

\* Reported in *Stran.* 890. and *Barnardiston's Rep.* K. B. 408, 418.

berless cases of amendments, after joinder in demurrer had been cited; that these cases shew there is no difference between civil and criminal suits. This must be esteemed a civil suit; nor can the fine prove it otherwise: since before the 5 *W. & M. c. 12.* there was a *capias pro fine* in several civil actions. That in the present case, the plea ought rather to be amended; because, had it been so bad as not to traverse the usurpation, there was no necessity to have demurred; but the prosecutors might have gone to trial on the issue joined, and a verdict for the crown would certainly have been well: and had the defendant had a verdict, yet judgment would have been given for the crown, since he had shewn no title in his plea; as in the case of the *King and Phillips*, of *Bodmyn*, *Mich. 7 Geo. 1.* [*Stran. 394.*] where, after an immaterial verdict for the defendant, judgment was given for the crown. *Broome and Rice*, *Trin. 4 Geo. 2.* [*Stran. 873.*] in an action of trespass there was a verdict for the defendant, and by reason of the bad plea, confessing the action, judgment for the plaintiff. That the counsel certifying in this case, that it was a mistake, brings it within the reason of *Ashley's case*, *Cro. Car. 144.* where the attorney general certified. As this plea says, according to the form of the letters patent, it is submitted to the court, whether there is not the charter to amend by. In the case of the *King and Hughes*, there was nothing to amend by. That as the danger of losing the action, which is said to be the cause of granting [43] amendments in some cases; that will serve strongly for the defendant, who must inevitably lose his office, if he does not amend. And that amendments have of late been much extended, for the sake of justice, and to give the parties an opportunity to try the right.

*Hardwicke Ch. J.* This is a question of consequence, and therefore was very fully argued on both sides ; but I am of opinion, that the defendant should have liberty to make his amendment. This is not an amendment given by any of the statutes of Jeofails ; but wholly founded on the common law, and the discretion of the court. It was anciently the rule, not to suffer any of those amendments to be made after the matter was on record ; but the number of cases now cited, shew that of late, in furtherance of justice, and in order to obtain the right between the parties, those amendments have been much extended. These amendments are hardly reducible to any certain rules ; though it were to be wished they could, since they have been so much extended. The cases cited, shew that the rules laid down by the counsel against the amendment, will hardly stand in any one point ; so that nothing more can be inferred from thence than that those amendments at the common law, are only discretionary in the court. In amendments before trial, it is no rule that there can be something to amend by. Another after rule was laid down, that the mistake must arise from the misprision of the clerk ; but in many cases, errors in law occasioned by the mistakes of the pleader, have been amended. There is no authority, in which it is cited, as a certain rule to tie up the hands of the court in making amendments, that no trial be lost ; for the necessary preparations for an argument on demurrer must wholly occasion that delay. Another rule is laid down, that, where the faultiness of the plea is wilful, the party injured may in his prayer have it amended, tho' the other party may not ; and this indeed may be a true rule. It is certainly a strong inducement to the discretion of the court to



grant an amendment, if the party would otherwise lose his action, though it is no rule; and in the present case it is an inducement equally strong, that the defendant must lose his office, without this amendment. Many cases shew that amendments may be granted after joinder in demurrer and argument thereon, as 2 *Saund.* 401. 1 *Ven.* 221. One objection chiefly relied on in this case is, that it is a criminal suit, and therefore cases of amendments in civil causes are not applicable to it. But there is no such distinction made in the books, as to amendments at common law. As to amendments on the statutes of jeofails, it may be true; since there are express words in them to that purpose. In the case of the *Queen and Tutchin*, 1 *Salk.* 51, it was the opinion of the court, that whatever at common law might be amended in civil causes, was amendable also in criminal matters. Indeed the case of *Cox and Wilbraham*, *Salk.* 50. is somewhat different. Nor does this seem to be a criminal suit, it being a doubt which divided the twelve judges in the case of *Shaftsbury*, whether informations in the nature of a *quo warranto*, are civil or criminal suits; but they rather partake of both natures, though more largely of the former, especially since the act of 4 & 5 *W. & M. c.* 18. which reduces them almost to a civil action.

The case of *Hughes*, though it is the single opinion of lord *Raymond*, yet it is a great one, and was never complained of, or excepted against. Another objection is, that they have lost a trial, and though this is no rule, yet it might be a strong inducement to the court not to grant this amendment; but then to make it any inducement, it is necessary that it appears to have been lost, merely on account of this mistake; but it is sworn on the contrary, that had it

been brought on, it would have gone off on a challenge, and therefore the prosecutors consented to put it off. Another objection is from the inconvenience arising from this proceeding, as it tends to frustrate the intention of 9 *Ann. c. 20.* which was partly made for the more speedy trial of those informations, that the right of annual officers might be determined within the year. And indeed, had this plea been wilfully put in for that purpose, it would have been a great inducement to the court to have refused this amendment; but as it is, on the contrary, sworn to have been a mistake, that is out of the question; and the defendant might have obtained his end by writ of error; for which, in these matters, to try a right, the attorney general always, of course, on any probable cause shewn, grants his fiat, though not on indictments or informations, for misdemeanours.

The rest of the judges concurring in opinion, leave was given to the defendant to make this amendment on payment of costs, and being bound to plead time enough to go to trial the next assize.

*Kent and May, verf. Kent. Stran. 971.*  
S. C.

THIS was a writ of error out of *B. R. in Ireland*, on a judgment given there on a writ of error, from the court of *C. B. in Ireland*, in dower. The defendant in *C. B.* pleaded double. 1st. The general issue. 2dly, That by an act made there, 6 *Ann. c. 16. s. 3.* if any woman, by subtle ways and means, prevailed on an infant to marry her, he having an estate of 50 *l. per annum*, and not having the consent of parents, that in such case the woman

If a writ of error be brought, and errors assigned by two parties, where one of them would have been sufficient, yet the unnecessary party will be liable to the

costs, because by *Stat. 16 and 17 Car. 2. c. 8.* he enters into a recognizance to pay such costs and damages as the court shall award.

should lose her dower; and then so pleaded as to bring her within the act. But this being an *Irish* act, and the court determining that the demandant was not within it, it is thought proper to take no farther notice of the objections and answers which [45] were given to it. There were two tenants to the writ of dower, *Edward May*, and *Robert Kent*. The demandant had judgment in *C. B.* to recover her dower, and 158 *l.* for damages and costs. They both bring error, and assign errors, and then *Edward May* dies, and there is judgment to abate the writ of error. Afterward, *Kent* and *Robert May*, the heir of *Edward*, bring a new writ of error; and the judgement is affirmed *in toto*; and a writ of *seisin* awarded for the dower against both, and execution for damages and costs against *Kent* only; and also for the value from the time of the judgment in *C. B.* to the time of the affirmance, according to the former computation.

Mr. *Strange* took the following exceptions to the judgment given in the *King's Bench* in *Ireland*, viz. 1. That the court gave her damages to the value of her dower, to the time of the judgment given in *C. B.* whereas it appeared she delayed her action for two years; and in 1 *Inst. 32. b.* is a caution given to women to bring their action in time, lest they lose their damages. 2dly. By *Stat. 3 H. 7. c. 10.* the demandant is intitled to costs, on affirmance of the judgment, upon the account of the delay. But the costs given in *B. R.* are not said to be occasioned by delay. 3dly. All the costs are laid on the surviving tenant, and none on the heir of the deceased tenant; and the heir is as much bound by the judgment as the other. 4thly. The entry of the judgement is, *quod demand. executionem inde*; and that the tenants be amerced, which is never done on a writ of error.

Mr. *Parker, contra.* A dowress is a favourite of the law; so is 3 Co. 78<sup>a</sup> & 13 Co. 22. As to the first exception, there are two answers to be given to it. 1st, That that fact cannot appear here, because the original writ of dower is not brought over by *Certiorari*, which they might have done; and 2dly, The case in 1 Inst. 32 b. is where the parties are ready to assign dower; which cannot be here, because they have contested it by their plea. As to the second objection, the court has no occasion to shew the reason of their judgment. And the judgment may be reversed as to costs, and affirmed as to the rest, if they are wrongly given. *Styl.* 290. *Farrs.* 154. As to the third objection, damages may be recovered against the survivor; and if damages be given against one only, costs cannot be given against the others. As to the 4th objection, this is helped, being after a verdict, by *Stat.* 16 and 17 *Car.* 2. *cap.* 8. which helps the mistakes of *Capiaturs*, *Misericordias*, &c.

Ch. J. Mr. *Parker* has answered the first exception; for you should allege diminution, and should have brought the original writ of dower here, by *Certiorari*, which is always the rule; for it cannot appear on the *placita*, when it was brought in; because an *essoïn* might be cast. Besides, if you would avoid damages, you should plead that you was always ready to have assigned the dower. As [46] to the second objection, this judgment being part by common law, and part by statute, it may be reversed for part, and affirmed for the other part: and though it appears by the precedents, that the words *occasione dilationis* used to be put in; yet I do not think them necessary; for the general rule is, that superior courts need not give a reason for their judgments: and if they give none, this court will not suppose but

that they have done right. But it is plain here that the dowress has been delayed; for she could not have execution till the judgment was affirmed in *B. R.* in *Ireland*; and that reason appears on the record. As to the third objection, if this be error, it can affect only that part of the judgement upon which it was given; and we must still affirm the judgment given in *C. B.* and that part likewise of the judgment given in the *King's Bench*, which is given on the common law, and in affirmance of the judgment given in the *Common Pleas* there. But the assignment of error here, is by *Kent* and *May* jointly; and the suggestion is, that the judgment in *B. R.* in *Ireland*, was given *ad damnum* of both. Now how can *Kent* and *May* jointly assign that for error, which was apparently for the benefit of *May*. As to the last exception, it is aided by the *Stat. 16 and 17 Car. 2.* being after a verdict.

The next day the Ch. Just. said, that the court were well satisfied, that as for any objection but the 4th, that the judgment ought to be affirmed; but as to that exception, they were doubtful. He therefore desired the counsel would speak again to this point only; for that they were not fully satisfied, how far plaintiffs in error may, without summons, or severance, jointly assign that for error, which is for the benefit of one of them.

He cited *Yelv. 107.* 8 Co. 59. *Beecher's case.* 1 *Roll. Abr. 759.* *Lee*, Just. cited 4 *Leon. 61, 64.* and *per Cur.* it was ordered to stand over.

Afterward, Serj. *Chapple*, for the plaintiffs in error, cited *Stat. of Merton, Carth. 134, 1 Roll. Abr. 761.* 1 *Sid. 357.* and 2 *Keb. 318.* where 'tis held, that the *Stat. 3 Hen. 7. c. 10.* did not extend to *Ireland*; and said, that by the *Stat. 16 and 17 Car. 2. c. 8.* it

is enacted, that damages and costs shall be given in dower against the plaintiff or plaintiffs, in the writ of error; and that as both the plaintiffs in error, had joined in the writ of error in *B. R. in Ireland*, that court could not separate them; but they ought to have given damages and costs against them jointly.

Ch. J. desired him to shew whether *May* could join with *Kent*, in assigning this for error; upon which the Serj. cited *Yelv.* 107. 1 *Roll. Abr.* 759. 8 *Co.* 59. *Beecher's* case. 4 *Leon.* 61.

Serj. *Eyre, contra.* *Poyning's* law was made the 10 *Hen.* 7. by which I think *Siderfin* must be mistaken; and that the *Stat.* 3 *Hen.* 7. does extend to *Ireland*; but the damages survive, and the heir is not accountable for them; and, as heir, he cannot be liable; for the executor is the only person chargeable, [47] and therefore if the heir release a writ of error, yet the executor may bring error for the damages. *Cro. Eliz.* 558. If an executor bring a writ of error on a judgment given against the testator, he shall not pay costs. 1 *Vent.* 166. 1 *Mod.* 77. So if he brings error on a judgment against himself, he shall not pay costs. 3 *Lev.* 375. The damages and costs given, are from the time of affirmance to the original judgment; and if *May* must pay that, he must pay for damages, &c. necessarily accruing in the life of his ancestor; for it appears that his ancestor brought a writ of error, and died after the assignment of error. Therefore this is a good judgment; but if it may be made better, then this court will give such judgment as should have been given in *B. R. in Ireland*. And that this is the usual practice appears by *Cro. Car.* 511, 512, 442. *Salk.* 401.

Serj. *Chapple* said, that this court could not alter the judgment; for that ought to be done by such

court as could award execution ; but this court cannot award execution upon this judgment, for that the writs from this court cannot be executed in *Ireland*.

Ch. Just. To be sure we cannot award execution, to be executed in *Ireland*. We will consider of this judgment.

Afterward the Ch. Just. delivered the opinion of the court. All the exceptions taken to this action have been formerly overruled, excepting this, that the court of *King's Bench* in *Ireland*, on the affirmance of the judgment given in *C. B.* there awarded damages and costs against *Kent* only, from the time of the judgment given in *C. B.* to the time that it was affirmed in *B. R.* whereas they ought to have awarded them jointly against *Kent* and *May*. And for this, we think the judgment given in *B. R.* in *Ireland* is wrong. In this case three things are to be considered ; 1<sup>st</sup>, Whether any such damages, &c. ought to have been given from the first judgment in *C. B.* to the time of its affirmance in *B. R.* 2<sup>dly</sup>, Whether such damages, &c. should have been given jointly, against *Kent* and *May*, or only against *Kent*. 3<sup>dly</sup>, Supposing these damages, &c. are wrong given, whether they both can assign this jointly for error. As to the first point, we think they ought to have given judgment for the damages, &c. from the time of first judgment given in *C. B.* to the time of its affirmance in *B. R.* not by virtue of the *Stat. of Merton*, but by 16 and 17 *Car. 2. c. 8. s. 4.* which (by a *Stat.* made the 17 and 18 *Car. 2. c. 12.* in *Ireland*) extends to *Ireland*. As to the second point, we think the judgment of damages, &c. should have been given both against *Kent* and *May*. It seems indeed, natural, to think that from the time of the judgment given in *C. B.* to the death of *May* the

[48] father, that the judgment of damages, &c. should not have been given against *May* the son, because he is not presumed to have received the profits of the lands at that time; and it seems reasonable that judgment of damages, &c. should be given against him, only from the time of the death of his father, to the affirmance of the judgment. But still we think that *May* the son, ought to have judgment of damages, &c. given against him, as to both the periods of time; because, by joining with *Kent* in the assigning of errors, he is by *Stat. 16 and 17 Car. 2. c. 8. f. 3.* bound to be subject to it; for that *May*, by joining in the writ of error, has entered into a recognizance to pay such costs and damages as the court shall award. And it is said in *f. 4.* of that statute, that execution shall be awarded for such mean profits, damage and costs of suit, generally, and without any particular description of time. But we think this judgment is likewise wrong given, for another reason not taken notice of in the argument, and that is, because no writ of inquiry of the mean profits and damages was awarded by the court of *B. R.* to issue pursuant to that statute *Sec. 4.* which statute is introductive of a new law, containing a positive injunction and order, that upon the return thereof judgment shall be given, and execution awarded for such mean profits and damages, and also costs of suit. It may be objected, that the statute says a writ of inquiry shall issue, in order that damages may be ascertained, which, in this case, was not necessary, they having been ascertained in the first judgment, and so appear of record. But I answer that, it is true, that on the statute of *Merton*, no such writ of inquiry was to issue, in case the damages appeared on record; and the reason



was, because no such writ is directed by that act. But the statute 16 and 17 *Car. 2.* requires that such writ shall issue, so that it is not left to the discretion of the court. Before the making the statute 16 and 17 *Car. 2.* the course was, that when the jury had found the issue for the demandant, they likewise, by an inquest of office, enquired of the time of the death of the husband, and the value of the lands, without issuing any writ of inquiry, as in the case of replevin, where damages are not assessed. So are the following precedents on demurrer, *Raft. 230. 2 Saund. 335. 1 Lut. 728. Pasch. 3 W. & M. Wooden, v. Worden. rot. 393.* and the following case after verdict, *1 Leon. 92.* But here is a case, where the act expressly requires, that there shall be a writ of inquiry without any distinction of time; and I think it is reasonable, that it should be so, though after a judgment given on a verdict, where the value of the lands has been found. For during the long dependency of a writ of error, the value of the lands may be greatly altered. I have been thus long on this head, because I do not find that this point has been ever yet well settled; and because the case in *2 Saund. 331.* seems to be against this doctrine, there having been no writ of inquiry. But that case is no authority against that which is now laid down, 1st, Because that point came not under the consideration of the court. 2dly, The damages there given were not *pro valore dotis, sed occasione dilationis executionis judicii.* As to the 3d question, it is a general rule, that where any error is to be assigned, which was for the benefit of [49] one party, that there shall be summons and severance. So is *Cro. Eliz. 891. Yelv. 3. Cro. Jac. 92.* But there is no such necessity for such summons and severance in this case, because here the

error arose from the default of the court in their judgment. If there is a mistake in the process in matter of delay, &c. the party shall not assign it, it being for his own benefit; so are the following cases, 8 Co. 59. *Beecher's case*. *Yelv.* 107. 2 *Saund.* 47. But where the error arises from the judgment of the court, the party may take advantage of it, by assigning it for error, as was done in *Beecher's case*. 1 *Rol. Abr.* 759. *Yelv.* 2. So here it appearing to be error in the manner of the court of *B. R.* in *Ireland*, giving their judgment as to the damages, &c. from the time of *C. B.* giving the first judgment to the time of its affirmance there, the judgment there given, as to them, must be reversed; but that part of the judgment relating to the award of selfin of the dower, &c. must stand affirmed. And I have no occasion to shew that where a judgment is part by common law, and part by the statute, that it may be reversed for one part, and affirmed for the other, it being a point at present so well settled, as appears by *Salk.* 24. *Farejfl.* (7 *Mod.*) 154-5. and many other books. But the question is, what judgment the court here must give. It is a general rule, that where a judgment is reversed in part, the superior court shall give such judgment as the inferior court ought to have given. But we cannot award execution into *Ireland*; and therefore we can give no judgment for the damages; for there should, for that purpose, issue a writ of inquiry of damages, &c. But we cannot send our writs to the sheriff of the county, where these lands lie, to execute it; and therefore we can only send back the record into *B. R.* and command them to issue a writ of inquiry, and to give judgment against *Kent* and *May* for them, from the time of the judgment given in *C. B.* to the time of its affirmance in

84 *Easter Term 7 Geo. 2. B. R.*

*B. R.* for we cannot give them here, as appears by *Cro. Jac.* 534. *Cro. Car.* 511. And this is analogous to the proceedings in a writ of error in the *Exchequer* chamber, where in case they reverse a judgment given in *B. R.* they return the record into the court of *King's Bench*, which court gives judgment, that the plaintiff shall recover, contrary to the first judgment; as it is in *Yelv.* 74. *Cro. Jac.* 206, 534. *Carth.* 180. S. P. Wherever therefore, a writ of inquiry is requisite, the *King's Bench* in *Ireland* must do all, and we send back the record to them with our command for that purpose. The judgment of this court, therefore is, that the judgment of *C. B.* in *Ireland*, and the judgment of affirmance in *B. R.* in the same kingdom, as to the seisin of the dower, be affirmed; and the other part of the judgment be reversed; and that this court will order them to award a writ of inquiry and execution thereon.

TRINITY TERM

[50]

7 AND 8 GEORGE II 2. IN B. R.

Jasper *vers.* Grosvenor, *Executor of*  
Peake.

Time to plead.

**I**T was moved last term, on the part of the defendant, for time to plead till this term; for that the defendant, ever since he had been executor, had been so ill of a dead palsy, that he has not been able to speak or write his name; so that he could not sign any renunciation, or give any instru-

ment to his attorney; and that it was an affair concerning trade, which no one knew but the defendant. It was granted, upon condition that he would not confess any judgment, or give preference to any creditor, to the prejudice of the plaintiff. The same motion was repeated this term for further time to plead till *Michaelmas* next; the defendant still remaining in the same circumstances.

*Hardwicke*, Ch. Just. Though this inconvenience, arising from the act of *God*, intitles the defendant to favour and compassion, yet that must not be carried so far as to hinder the plaintiff from recovering his right, which may now be the case, as nothing is laid before the court, to shew that there is any probability of the defendant's recovery; but that if the defendant is reduced under such circumstances, as not to be able to transact his affairs, it is sufficient cause to sue out a commission in *Chancery* to take him into custody; and then the plaintiff will know what persons to come upon for his debt. This was done in the case of *Pitt*, who having lost his speech in an apoplectic fit, though he shewed some signs of sense, had, after great litigations, in *Chancery*, a commission taken out against him. The court at length allowed the defendant further time to plead, upon his consenting to be bound in a rule to plead time enough to have the issue tried in *Michaelmas* term next.

N. B. It was admitted in this case that an executor named in a will may be sued before the probate, though he cannot sue. And *Salk.* 302. was cited, where it is said *per Powell, J.* that an executor may commence an action before probate, though he cannot go on so far as to declare.

Executor may  
be sued before  
probate.

*Francis, verf. Nash.*

In what case an execution may be set aside.

**O**N a motion to set aside an execution on a judgment confessed, for irregularity, it was ruled, 1st, That where the judgment has been confessed with an express *cesset executio*, till a certain time, and execution is taken out within that time, the court may set it aside; but when there are long collateral agreements, and the defendant alleges, that by reason of them, execution ought to stay, this court cannot enter into and try the equity arising on them; but the defendant, if aggrieved, must apply for relief to *Chancery*. 2dly, Nothing can be taken in execution that cannot be sold, as deeds, writings, &c. 3dly. That bank notes, &c. cannot be taken in execution; for tho' they are assignable over, yet they remain, in some measure, choses in action; and the sheriff or his bargainee, cannot bring an action on them without assignment, notwithstanding the act for assigning them. And they are so much things in action that it was necessary to have a new act, in order to make the stealing them felony.

Bank notes cannot be taken in execution.

*Clerke, verf. Comer.*

Action lies on breach of articles not to set up trade.

**A**N action of debt on articles, that plaintiff taught the defendant his trade, on condition that he would not set up within the bills of mortality, under the penalty of 44 *l.* The action was brought in *C. B.* Breach was assigned. The defendant demurred to the declaration, and the plaintiff had judgment. On this a writ of error was brought in *B. R.* and judgment was affirmed upon the

authority of the case of *Chefman and Nainby* [lord Raym. 1456. *Stran.* 739.] affirmed in the *House of Lords*, with costs, *Hill.* 13 *Geo.* 1. upon the foundation of the case of *Mitchel and Reynolds* [1 *P. Will.* 181, 182,] in each of which it was adjudged, that an action will lie on breach of such articles.

### Sheppard, *verf.* Brand.

[52] ON a motion to set aside an award, made on a rule of reference to the three foremen of a special jury, exception was taken first, That the arbitrators had taken upon them to give a particular sum for costs, which should have been left to the taxation of the master. Secondly, That they had also taken money of the plaintiff alone, for their charges, without any bill delivered in before the making their award.

Award set aside; for that the arbitrators had taken money of one of the parties.

*Hardwicke*, Ch. Just. Arbitrators who are judges to determine finally the differences between the parties, may, if they think fit, take upon them to enquire of and give costs, as well as damages; and this court has no power to take notice of it any otherwise than if they are excessive, without any reason given for it, as an evidence of some undue practice. As to the second point, where arbitrators, let their characters otherwise be never so unexceptionable, take money of one of the parties singly, whether for charges or any thing else, before making their award; as this is a matter of so tender a nature that even the appearance of evil in it is to be avoided; and this practice may be of dangerous example, it is sufficient cause to set aside the award,

for if this should be suffered it will be hard to distinguish what is corruption. The award was set aside.

Smith, *vers.* Hickson. *Stran.* 977. S. C.

Case lies by the husband only for a malicious prosecution against his wife, on account of the expence he is put to in her defence.

THE plaintiff brought an action against the defendant for a malicious prosecution in indicting him and his wife for receiving stolen goods, knowing them to be stolen. The plaintiff sets forth in his declaration, that the bill preferred against them was found *ignoramus*; and that he had thereby suffered great damage in his reputation and trade, and had been at great charge and cost in defending himself, and likewise at great cost and expence in defending his wife in this prosecution. The defendant pleaded not guilty. The verdict found, as to the prosecution against the plaintiff himself, for the defendant, and as to the prosecution against the wife, for the plaintiff.

Serj. *Eyre* moved on behalf of the defendant, in arrest of judgment. 1st, That a man cannot sue alone for damage done to his wife, but both baron and feme must join in the action; and therefore this finding for the plaintiff only, as to that part of the declaration which concerns the wife, is, if any thing, a finding for the defendant, and consequently they ought to have found costs for him, *Cro. Eliz.* 147, 157. 1 *Leon.* 299. 2 *And.* 48. 2dly, That as there was but one issue, the verdict was ill, as finding one part for the plaintiff and part for the defendant.

Serj. *Chapple* for the defendant argued, that had this been an action on a contract, the whole declaration must have been proved, and the jury must

[53] have found wholly for the plaintiff or for the defendant, the issues being joint ; but in actions on torts, the issues are several, and it is sufficient to prove any one charge in the declaration, and the jury may find part for the one and part for the other. *Crs. Eliz.* 884. In an action on the case, the plaintiff declared that the defendant sold to the plaintiff two oxen, warranting them to be sound, when in fact they were not so; the defendant pleaded not guilty; the jury found for the plaintiff as to one of the oxen, and for the defendant as to the other. On a motion in arrest of judgment, the court were of opinion, that it was not on the contract, but on the tort, the action was good. 1. *Sid.* 5. On an action of debt against the sheriff for an escape; the declaration charged, that husband and wife were taken into execution and escaped. The jury found that the husband did escape, but that the wife was not taken into custody, nor had escaped; and *per Curiam*, it was the same thing as if no mention had been made in the declaration about the escape of the wife, and the verdict was good. 2ndly, That as the husband had here sustained special damages on account of the prosecution against his wife, he might bring his action to recover those damages without her joining with him. *Cro. Car.* 553. An action was brought by *Baron and Feme*, for a malicious prosecution, and on a writ of error, it was insisted, that they could not join in that action. There does not appear any judgment reported in *Croke*, but in *Will. Jones* 440. & *March.* 47. it is said to be determined, that they could not join in such an action where the husband had sustained the whole damage. Indeed, where the wife had an interest they might.

*Hardwicke*, Ch. Just. The general distinction



taken between torts and contracts is right. In contracts it is necessary to prove all the charges in the declaration exactly in the manner they are laid; but in torts they are several, and if you sufficiently prove one of them, you prove your case. 2dly, That in the case of *Savil* and *Roberts*, reported in *Salk.* 13. it was determined by *Holt*, Ch. Just. that an action for a malicious prosecution, where the bill is found *ignoramus*, will be only where the prosecution imported matter scandalous and infamous to the party, and not where it had only put him to expence. But this matter came again principally to be considered, when lord *Macclesfield* was Ch. Just. of this court, in the case of *Jones* and *Gwyn*, *Trin.* 11 *Ann.* 10 *Mod. Rep.* 149 & 214 relating to badgers and chapmen. In this case there was no pretence that it tended to the infamy of the party, but only that it had put him to expence; and it was there resolved, that there was no ground for the distinction made in the case of *Savil* and *Roberts*; but that though the indictment was insufficient, or found *ignoramus*, an action on a malicious prosecution might as well be sustained, where the party was put to an expence only, without infamy, as where the matter of the prosecution was infamous and scandalous. And had the law now stood upon the opinion of Ch. Just. *Holt*, the verdict would have been bad; but as it now stands upon the last determination, the plaintiff might alone maintain the action by reason of the special and particular damage he sustained in defending his wife; as in the case of an action by the husband alone, for the assault and battery of his wife, *per quod consortium amisit*. The plaintiff had judgment. [54]

**Birchman, *vers.* Noright.**

**I**N an ejectment brought by an infant, a motion was made for a rule to compel the lessor of the plaintiff to make a real lessee, who might be responsible, or to give security for the payment of the costs; this being determined to be the course of the court in the case of *Throgmorton and Smith, on the demise of Miller, Pasc. 5 Geo. 2. [Stran. 932.]* and before in the case of *Noke, v. Windham. Pasc. 12 Geo. 1. Stran. 694.* A rule for that purpose was granted.

Where lessor is an infant, security must be given for costs.

**Nichols, *vers.* Sutcliff.**

**I**N an action on the case on *assumpsit*, it was moved on behalf of the defendant, for leave to withdraw the plea of *nihil debet*, which he had put in, and to plead *non assumpsit*. The following cases were cited to shew, that the court had granted this liberty before, *Eads and Mason, Pasch. 5 Geo. 2. B. R. 2 Barn. 139* when it was moved to withdraw the general plea, *non assumpsit*, and to plead a tender, as to part, and *non assumpsit* to the rest. And in the case of *Mostyn, and Tottin, Mich. 3 Geo. 2.* in the *Exchequer*, the court gave the defendant leave to withdraw his demurrer, and plead the general issue. Leave was granted on the common terms of payment of costs and taking short notice of trial.

Liberty given to withdraw one plea and put in another.

Dominus Rex, *vers.* Ragsden.

Information in  
the nature of a  
*quo warranto*,  
granted against  
a chief con-  
stable.

ON a rule to shew cause why an information in the nature of a *quo warranto*, should not go against the defendant, to shew by what authority he took upon himself the exercise of the office of chief constable of the hundred of        within which hundred the duke of *Montague* had a court leet. It was objected by Mr. *Abney*, that the prosecutor's affidavits were drawn by Mr. *Bramston*, who was steward of that court, and that they were copied by his clerk. But the Ch. Just. held, that this was not a good objection against them; for this is not sufficient proof of his being an attorney in this cause, though it may be of his being an attorney. But a person being an attorney in another cause for a man is no objection. Then Mr. *Marsh* said, that the office of a constable [55] is of so low a nature, that this information will not lie against him, unless he happens to be a returning officer for members of parliament; and that the remedy against him should be by indictment. But *per* Ch. Just. doubtless from the nature of this office, and the consequence of it to government, such informations will lie against a chief constable; and his being a returning officer does not make him the more liable to it, tho' it may often prove a great motive for the bringing it. And this very day we have granted such an information against the common serjeant of *New Romney*. The information was granted.

Middleton *and his Wife, v. Croft.*  
*Stran. 1056. S. C.*

THE plaintiffs were libelled against in the consistory court of the bishop of *Hereford*, at the promotion of the defendant *Croft*, for their marrying clandestinely, *viz.* without banns published in the church, or any licence had for marrying out of canonical hours, *viz.* between the hours of one and eight in the morning, and for being married by the parson in his own house, and out of the diocese where they lived.

Prohibition on a libel against a person married clandestinely; for the power of the Ecclesiastical Court is over the parson in marrying.

To this libel the plaintiffs prayed a prohibition; suggesting, that by the statute 7 and 8 *W. 3. c. 35. s. 4.* the marrying without licence, is made a temporal offence; that statute reciting the statute 5 and 6 *W. & M. c. 21.* and inflicting the penalty of 10*l.* on every man who shall marry without banns or licence; and therefore they could not be punished for it in the ecclesiastical court.

They suggested likewise, that that court would not allow of one witness; but having no affidavit that they disallowed such evidence, that part of the suggestion was given up; so that it entirely relied on the validity of the first suggestion. A rule was given to shew cause, and some time after, doctor *Andrews*, of counsel for the defendant, argued thus: Wherever a temporal incident falls in with a cause, originally of ecclesiastical consufance, the original draws the incident into that *examen*. The suit in the spiritual court is not for the penalty, but to punish the offence of marrying clandestinely; and the above statute was not designed as a punishment for marrying clandestinely, but only for the sake of

securing the stamp duty. Suppose two persons under age, by false suggestion, should obtain a license for marriage, as is sometimes done, the license being paid for, the penalty on the act cannot be recovered, and the persons will go unpunished, if we cannot proceed against them: and so it would be the same in case the banns were published in a parish where neither of the parties lived. The punishment of a clergyman marrying in that case, is suspension from his benefice for three years; and if he is not benefited, he is punished as a lay man, by being excommunicated, *ipso facto*. And all present are under the same penalty, if they know what is doing. [56] *Lyndwood, Lib. 4. Tit. 3.* By the canon 101, no licence is to be granted, but by the ordinary in his own diocese. By Canon 62, none shall be married but between the hours of eight and twelve, and by licence. By canon 103, oath shall be made of the age of the parties, or of the express consent of their parents, or guardians, in case they are not of age, before any licence shall be granted. In many acts of parliament, tho' there has been no saving of the power of the *Ecclesiastical Court*, yet it has been held that it has not been taken away, as in the case of *Tithes*, 32 *H. 8. c. 7, f. 2.* In statute 2 and 3 *Edw. 6. c. 13*, there is no saving of the power of the *Temporal Court*, and yet it has been always held that their power is not taken away. So in the statute of distributions, 22 and 23 *Car. 2. c. 10.* there is no saving of the temporal jurisdiction, and yet it is not taken away. And we have but one rule to interpret statutes by, whether they relate to the temporal or spiritual jurisdiction. Where a statute gives a new remedy, or inflicts a new punishment, it takes not away the old power, unless as far as it is contrary to

it ; as in the case of indictments ; the statute 21 H. 8. c. 13. of pluralities, takes not away the spiritual power, tho' there is no saving in it. So is *Latch* 244. Where there are no prohibitory words in a statute, no prohibition shall go ; so is *Het.* 87. & 131. But it may be objected, that if a prohibition is not to go in this case, that then the party will be twice punished for the same thing. But the punishments are to different purposes, as at the common law, a master may bring an action for the beating his servant ; the servant may bring an action for the battery, and the party may be likewise indicted. So in the case of adultery, both the common law and spiritual law may proceed against the adulterer. In 1 *Lev.* 138. a layman forged orders, and obtains a benefice, for which he is prosecuted in the *Ecclesiastical Court*, in order to deprivation ; and he prayed a prohibition, because the forgery is triable at the common law ; but the prohibition was denied ; for the prohibition is touching an ecclesiastical matter ; and he is sued there for it, in order to his deprivation only. So in the case of *Kerby* and *Savil*, *Hil.* 1716, 10 *Mod.* 385, action was against *Kerby*, in the *Temporal Court*, for calling the plaintiff *bawd* ; and she libelled likewise in the *Spiritual Court* ; and prohibition was denied, because the first suit was for damages, and the other for the reformation of his manners, and health of his soul. So here are two causes to be proved against the plaintiff ; the one for not paying the duty of a license ; and the other for their offence, in marrying clandestinely. This act was made forty years since ; and though complaints of this nature come daily before us, yet this court never took notice of it. The suppression of mischief, and the advancement of the remedy, is the best rule to interpret

statutes by: and as clandestine marriages are very mischievous, it would be proper to prevent them. [57] But if this act should be construed to take away the spiritual jurisdiction, it would very much lessen the remedy.

Mr. *Strange*, on the same side. But a very little of this libel comes within the act 7 and 8 *Will.* for as to the marrying out of canonical hours, there is no statute against it; therefore the only question is, whether a prohibition ought to go for the *Spiritual Court*, libelling against them for marrying without banns or licence; and that only affects the husband. It would be an encouragement to clandestine marriages, if they were only to pay 10 *l.* and incur no further censure. The act is plainly a revenue act, laying 5 *s.* duty on every licence or banns; and inflicting a penalty of 10 *l.* on those who marry without them; which penalty is only given for the better security of the 5 *s.* duty, and not as a penalty adequate to the offence of marrying without them. But suppose this to be but one and the same offence, yet this is a proceeding *diverso intuitu*; as in the case of a pension given to an ecclesiastical person, he may sue for it in the *Spiritual Court*, tho' it arises by prescription, which is a matter generally of a temporal consance, viz. as an annuity. So is *F. N. B.* 51. 1 *Sid.* 146. 1 *Vent.* 3. In the case of *Townsend* and *Thorpe*, 13 *Geo.* 1. [*Stran.* 776. *Lord Raym.* 1507.] the parson was indicted for sodomy, drunkenness, and a multitude of other offences; and this court would not grant a prohibition to the *Spiritual Court*, which was proceeding against him to deprivation only, until the indictment was tried, and upon his being found guilty, a consultation was awarded, and he was afterwards deprived.

Mr. *Clive*, *contra*. The offences complained of in the libel, are only so as to the minister who married them, and not in the party married.

Ch. Just. Asked Dr. *Andrews*, whether he remembered any suit against the parties themselves for a clandestine marriage; and he answered that he could not immediately think of any; but that their courts were never apprehensive, but that they might be proceeded against.

Mr. *Clive*. The statute 7 and 8 *Will.* is a general act, and there is no saving clause in it; and therefore as it inflicts a penalty, the power of the *Spiritual Court* is taken away, as to that offence. *Hob.* 192. In the statute 10 *Ann. c.* 19. *f.* 177. there is a saving of ecclesiastical jurisdiction. The case cited out of 1 *Lev.* 138 is for us. In Sir *T. Jones*, 131, 132. a penalty being given by act of parliament, for exercising a spiritual function without orders, and there being no saving in the act, it was held that the power of the *Spiritual Court* was, in that case, taken away; which is a case expressly in point. And the *Spiritual Court* cannot avoid the marriage.

[58] Mr. *Gundry*, on the same side. Canons cannot bind the laity, unless they have had a sanction given them by the statute law, as in *Salk.* 412. and the canons of 1603, of which those cited are part, have often been held not to bind the laity, because they never were confirmed by parliament. All these complaints are but different circumstances of the offence of marrying clandestinely. At common law, where the temporal and spiritual jurisdiction clash, the temporal shall have the pre-eminence. So is 1 *Inst.* 96. In *Salk.* 552. it is held that to call one a bawd, is not actionable; and this answers the case of *Kirby* and *Savill*. As to the law of adultery, no



indictment lies for it; so is 2 *Inst.* 488. Where two powers clash by acts of parliament, the spiritual power is taken away, unless it be saved by the statute, as in the case in Sir *T. Jones*, cited by Mr. *Clive*. And many crimes formerly punishable by the *Spiritual Court*, are now taken away, on account of statutes making them offences against the common law, as buggery. Their most ancient jurisdiction was in the case of *Tithes*, and yet in 11 *Co. rep.* 56 *b* their power is said to be taken away, because of the settled *quantum* of the tithes. *Hard.* 116. And the manner of penning statutes is very material; for saving clauses are always put in when the legislature would have the power of the *Spiritual Court* preserved, as appears by the statutes 13 *Eliz. c. 2.* 23 *Eliz. c. 1.* 4 *Jac. 1. c. 5.* 10 *Ann. c. 19.* As to the parson suing for a pension in the *Spiritual Court*, tho' by prescription, he shall never after sue for it otherwise. It is plain the statute 7 and 8 *Will.* was not made only for the duty; for in the preamble, it is said, *to prevent many other inconveniences*; and the prosecution in the *Spiritual Court* cannot prevent any mischief.

Ch. Just. Tho' the libel is general for a clandestine marriage, yet I think the particulars set forth, will, in the *Spiritual Court*, be considered as so many distinct offences, being against several canons made in the year 1603. I do not find that there are any ecclesiastical laws against marrying without banns or licence, which will bind the laity, unless it be the ancient constitution of archbishop *Stratford*; and whether or no that constitution was ever confirmed by parliament, I know not. But if it was not, it will not bind the laity. The canons forbidding the people to marry in private houses, and within canonical hours, which were cited by Dr. *Andrews*,

do not bind the laity, for they are part of the canons made in the year 1603, which were never confirmed by parliament; and therefore I think a prohibition ought to go as to them; for doubtless a prohibition may go for part, and a consultation for another part, tho' it be held *contra* in *Hob.* But whether or no the act 7 and 8 *W.* 3. takes away the power of the *Spiritual Court*, in cases where persons marry without banns or licence, is a question of difficulty and consequence. The case of *Matthews and Burdett*, in *Salk.* 672. which was whether a licence is necessary for teaching a grammar school, is not determined. To be sure, there is a great difference in cases where the two courts proceed *diverso intuitu*; and where [59] for the same purpose. In the case of *Townsend and Thorpe*, it was so. But when the *Spiritual Court* proceeds only to punish generally *pro reformatione morum*, if that same offence be punishable by a statute, in which there is no saving of the spiritual jurisdiction, I do not know whether their power may not, in that case, be taken away. The statute 7 and 8 *Will.* does say in the preamble, that it is made for preventing other inconveniences; but when it comes to the clause of the penalty, it says, *for the better ascertaining, levying, and collecting, the said duties*; so that the penalty is expressly given for the better security of the duty payable upon banns and licences. And as this act has so declared it, the question is, whether we can consider it to be given for any other respect. And this seems to distinguish it from the cases cited; for this penalty is given *diverso intuitu*; but this being a new case, deserves consideration. But I think that, as to the offence, supposed to be incurred, by breach of the canons made in 1603, that a general prohibition ought to go; and as to

the offence for marrying without banns or licences, that a rule should be made for the plaintiff to declare in prohibition, that it may be solemnly determined.

*Page, Just.* I think this act has not taken away the power of the *Spiritual Court*, to proceed upon the banns and licences; because the act seems to me, to be made only on account of securing the duties. But still I doubt what power the *Spiritual Court* has, to punish the laity, who marry without any banns or licence.

*Probyn, Just.* If the whole is but one offence, the prohibition must be general; and I think all the matters complained of, are so many evidences of a clandestine marriage. I always thought that where an offence was in its nature originally of ecclesiastical consufance, and a statute inflicts a penalty on it, that that penalty took away the whole *examen* of it from the *Spiritual Court*: therefore I think a general prohibition should go for the whole.

*Lee, Just.* I think the rule, that wherever a penalty is given by statute, without a saving, that, in that case, the spiritual jurisdiction is taken away, is too general; for in the case of *Rex, v. Sanchy and Tipper*, *Hil. 9 Will. 3. 12. Mod. 165, Holt, Ch. Just.* held that remedy for tithes against the quaker, is only an additional remedy; and cited the case of a provision being given to an ecclesiastical person; for that the *Spiritual Court* has a concurrent jurisdiction. But where a statute alters an offence, and makes it of an higher nature, then the spiritual power is taken away, as in the case of buggery, and the like. Upon the whole, I think it is reduced to the constitution of archbishop *Stratford*; and therefore I think there should be a prohibition to declare upon.

*Ch. Just.* I cannot think this libel contains only one offence, as my brother *Probyn* imagines; for the

[60] *Ecclesiastical Court* will find them guilty of a clandestine marriage, if they can convict them but of one of the irregularities complained of, tho' they cannot prove the others. However, let there be a general rule to declare in prohibition. And *per cur.* they were ordered to declare in prohibition.

Afterward, the suggestion of this case being turned into a declaration on a prohibition, and the effect of the libel into a plea, the plaintiff demurred to it, and the defendant joined in demurrer. And now Dr. *Andrews*, of counsel for the defendant, argued thus : the ecclesiastical law consists of two parts, the *jus scriptum* and *jus non scriptum* ; the greatest part of the ecclesiastical law is made up of the *jus non scriptum*, as the law by which bishops hold their visitations, the office of church-wardens, &c. which are founded on no particular written laws, but yet may be called *jus commune ecclesiasticum*. The declaration says, that the lay-people of the realm are not punishable by any canons and constitutions, and that this is an offence punishable only by the statute 7 and 8 *Will. 3. c. 35. s. 4.* so that the first question is, whether laymen are punishable by any canon and constitution, especially those made in 1603, for clandestine marriages. 2dly, Whether the canons relating to marriages extend to the laity.

As to the first, there are many canons to that purpose in the fourth book of the *Decretals* by the council of *Lateran*, lib. 4. tit. 3. *de clandestina desponsatione*,\* and in *Hard.* 101. it is held that the constitutions of the council of *Lateran*, are general laws received in *England*, and as forcible as an act of parliament ; and the council of *Oxford*, held in the year 1222, confirms the council of *Lateran*. In 1 *Roll. Abr.* 359.

\* *Vide Corpus Juris Canonici. Decretal, Gregor. 9. lib. 4. c. 3.*

pl. 18. *Foxcraft's case*, it is said that the issue of a clandestine marriage was adjudged a bastard ; so that formerly the canons were more strictly observed in *England*, than they are now by the temporal or ecclesiastical courts. The statutes 2 and 3 *Ed. 6. c. 21*, and 5 and 6 *Ed. 6. c. 12*. take notice of these canons. Canon 101, 102, 103, 104, of the canons made and passed in the convocation, 1603, and confirmed by the king's letters patent, are all against these marriages. In the rubrick of the *Common Prayer Book*, which is confirmed by act of parliament, it is said, that marriages shall be openly solemnized in the church ; and marriages are there said to be spiritual.

The next question is, whether canons made in the convocation bind the laity. By the statute 25 *Hen. 8. c. 19*. all the former canons and constitutions before, as well as those which were to be made after, the statutes, are confirmed ; provided they be not repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm. And by 4 *Inf. 323*, it appears that this act was only declaratory of the old law ; and as the convocation assembled by his writ, and the laws are made by them with his licence, they bind the laity. And by this statute the convocation has still as great a power to make obligatory canons, as they had before the statute. And in considering the obligation of canons, the persons are not to be regarded, but the matter ; not whether the canons make any laws concerning spiritual or lay persons, but whether they are made in relation to a matter of a spiritual or a temporal nature. The constitutions of *Lyndwood* were made by the convocation, and still affect the laity, and this power of the clergy is immemorial, and the persons are never considered distinct from the matter of the law, as in the case

of the admiralty jurisdiction, &c. By *Magna Charta* itself, it is said that the church shall be free and have all its liberties preserved entire; and it is part of the king's supremacy, that he, with the consent of the clergy, may bind the laity in spiritual matters; and in the 104th canon of the canons made in 1603, it was the express opinion of the great men of the nation, that the king and the clergy had such power of binding the laity; and there have been several instances where these canons have been put in execution and submitted to.

In the year 1598, Sir *Edward Coke*, then attorney general, married the lady *Hatton*, according to the book of *Common Prayer*, but without banns or licence, and in a private house. Several great men were then present, as lord *Burleigh*, lord chancellor *Egerton*, &c. they all, by their proctor, submitted to the censure of the archbishop, who granted them an absolution from the excommunication they had incurred. The act of absolution set forth, that it was granted by reason of penitence, and the fact seeming to have been done through ignorance of the law. This may be seen in the register of *Whitgift*, fo. 108, and in *Collier's Church History*, vol. 2, p. 662. Another case was in 1601, where *Thomas James*, and *Mary James*, were excommunicated for marrying clandestinely, and afterwards were absolved, 3 *Whitgift Reg.* 106. In the year 1603, an absolution was given to two persons on this account. 1 *Abbot Reg.* 160. But there are many authorities at common law, which shew that the laity are bound by the canons. As the case of *Bird and Smith*, *Moore* 781. on a question in relation to the power of the canons, there was a meeting of the lord chancellor, the two chief justices, and the chief baron; and it was by them resolved, that the canons of the

church of *England*, made by the convocation, and confirmed by the king, tho' not ratified by any act of parliament, as firmly bind the whole realm in ecclesiastical matters, as an act of parliament. *Vaugh.* 327. *Hill and Good.* A prosecution was commenced in the *Ecclesiastical Court*, against a person for marrying his wife's sister. A prohibition went, but a consultation was prayed and granted; and it is there said, that if by the canons a marriage be declared to be against God's law, we must admit it to be so; for that a lawful canon is as much a law as an act of parliament, or any part of the law; because the law, *non recipit majus et minus.* [*Will. Jones* 257.] *Martingley, v. Martyn.* The plaintiffs were cited for living together, as husband and wife, without solemnizing their marriage; and on their application for a prohibition, it was held that persons being together as husband and wife, without being known to be married; or persons married without banns or licences, are citeable into the *Ecclesiastical Court.* *Vaugh.* 18, 21, *Edes versus bishop of Oxford.* [62]

In 2 *Vent.* 44. It is Mr. Justice *Vaughan's* opinion, that the canons of 1603, though not confirmed by parliament, yet being confirmed by the king, sufficiently bind the laity; and it is there also held, that a person might be prosecuted in the *Ecclesiastical Court*, for keeping a conventicle, (before the toleration) notwithstanding the temporal punishment inflicted by the statute, since they were *diverso intuitu.* In 2 *Lev.* 222. it is held, that though the statute inflicts a penalty for teaching school without licence; yet the *Spiritual Court* may proceed to punish by the canons. Indeed, in 12 *Rep.* 72. it is laid down, that the convocation may make constitutions to bind the spirituality, but not the laity; but then there is

an exception in the end, as to the spiritual persons, and spiritual things; and this is said to be taken from the prior of *Leeds* case, 20 *Hen. 6*, 13. from which no conclusion can be drawn. It is, indeed, said, that the convocation cannot bind the temporality; but by that must be understood temporal matters, and not temporal persons; for the very party there was a spiritual person. The same case is in *Bro. Ab.* title *Ordinary*, pl. 1. As rectors are the guides of their parishes in spiritual matters, and they choose their procurators for their convocation, it cannot be said but that the whole kingdom have their representatives in that assembly; for none but freeholders having such an estate choose members of parliament; and yet they are looked on as representatives of the nation. Supposing, therefore, the laity to be punishable for clandestine marriages, it remains to consider, whether the statute 7 and 8 *Will. 3. c. 35*, by inflicting a temporal punishment, has taken away the ecclesiastical jurisdiction, there being no saving clause in the act. The title of that act is, *An Act for the enforcing of the Laws which restrain Marriages without Licence or Banns, &c.* Now there were then no laws in being against the persons married, but ecclesiastical laws. Indeed the act of 6 and 7 *Will. 3. c. 6. f. 52*, inflicts upon clergymen marrying without licence, the penalty of 100*l.* but that was only for the better securing the stamp duty; and an enforcing act can never be interpreted to destroy the thing it was intended to enforce.

In the statute 10 *Ann. c. 19*, after clause 176, concerning clandestine marriages, there is a strong clause saving all ecclesiastical jurisdiction; which must have been upon a presumption that the ecclesiastical laws relating to this point were still in force; otherwise it



were saving a thing not in being, if the spiritual jurisdiction was taken away by the act of king *William*. Acts of parliament ought to receive such an interpretation as will more effectually enforce the remedy and prevent the mischief; but to say that the act of *Will* [63] 3. took away all ecclesiastical jurisdiction in this case, will have the contrary effect; as there would be no punishments left for persons marrying in a private house, and out of canonical hours, provided they had a licence.

The *Ecclesiastical* and *Temporal Courts*, have often a concurrent jurisdiction; and then the sentence in one court will bar proceedings in the other; but here they do not in the least affect one another; they being for distinct ends; the prosecution in the *Spiritual Court* being *pro salute animæ*, and that in the king's courts for temporal satisfaction.

In the case of adultery, a person may be sued at common law for damages, and for penance, in the *Spiritual Court*; so for laying violent hands on a clerk, a person may be indicted at common law for breach of the peace and fined; and yet excommunicated in the *Ecclesiastical Court*; the punishment being *diverso intuitu*; as likewise in the case of usury. 1 *Lev.* 138. *Slader* and *Smalbrooke*, the *Ecclesiastical Court* was allowed to proceed and deprive a pretended clergyman, who had forged orders, after that he had been convicted and punished for the forgery at common law. *Hill* and *Boomer*, *Jones (Thomas)* 131, is indeed contrary; but it is submitted which is the most reasonable determination. *Kirby* and *Savill*, 1716. 10 *Mod.* 385. A person sued for defamation in the *Spiritual Court*, moved for a prohibition, because the plaintiff had received damages in the king's courts; but denied, because the prosecutions were for different

ends. 4 *Co.* 20. *Latch.* 244. *Hob.* 187. Where the statutes do not intend there should be double penalties, there is often an express clause to that purpose, as in 4 *Jac.* 1. c. 5. against drunkenness, and 3 *Jac.* 1. c. 4. against recusants. In the case of *Crow* and *Dickman*, in *C. B.* 1716, it was the opinion of the Lord King, that the want of saving clauses does not take away the jurisdiction of the *Spiritual Court*. In the present case the declaration is ill; as it sets forth the statute was made the twenty-second of *November*, in the seventh and eighth years of *Will.* 3. which is impossible; because one and the same day cannot be in both years. Had it been said an act made in the parliament holden in the 7 and 8 *Will.* 3. it might have been good.

Mr. *Clive* for the plaintiffs. The sixty-second canon of those made in 1603, says only that no minister shall marry without licence or banns, nor privately, and all the rest of the canons are made in consequence of this, with reference only to clergymen, and they say nothing concerning the laity. The constitution *de humana concupiscentia*, extends only to the clergy. *Lyndwood Provinciale*, lib. 4. tit. 3. describes what a clandestine marriage is, and this whole complaint makes it but one offence of a clandestine marriage; and they are not to be considered separately, as making different species of the same offence. Suits of this nature would prove of bad consequence, supposing the words *hujusmodi interessentes* in the constitution of archbishop *Stratford*, extended to the laity, who were present at such marriages; for the whole congregation of *Quakers* always assemble at their marriages; and by this doctrine they might be all punished. But the canons in 1603, bind only the clergy, and not the laity, as appears by *Salk.* 412. In *Brooke*, tit. ordi-

nary, 1. 20 *Hen. 6.* 13. 21 *Ed. 4.* 47. It is said that the convocation is spiritual, and so are all its constitutions. In *Hale's History of the Common Law*, 27, it appears that all the strength the canon laws have obtained in this kingdom, proceeds from their having been received by consent of parliament, or from immemorial usage and custom; whereas the canons of 1603, have neither of these sanctions.

That the provision of the act of 25 *Hen. 8. c. 19.* was never duly fulfilled; for that gave a personal power to *Hen. 8.* to constitute thirty-two persons with a power to choose a body of canons out of those then in force, which should be binding to the whole realm, which power was never executed. The same power was given by 3 and 4 *Ed. 6. c. 11.* to that king, but his death also rendered it ineffectual; and *Gibson* in his *Codex* says, that a body of canons was prepared, but he died before he gave his assent. The same power was given to queen *Elizabeth*, but it slept during her life, and has never since been revived.

As to the second point, the statute 7 and 8 *Will. 3.* is a general law, and is made without any saving clause to the ecclesiastical jurisdiction: and in 1 *Inst.* 96. *b.* it is laid down as a maxim in law, that where the common or statute law gives a remedy *in foro seculari*, (whether the matter be spiritual or temporal) the consueance of that cause belongs to the temporal courts only; unless the jurisdiction of the *Ecclesiastical Court* be saved or allowed by the same statute, to proceed according to the ecclesiastical laws.

There are several authorities to shew, that an action for the same thing will not lie in both courts. *Salk.* 552. *Farres.* (7 *Mod.*) 78. 2 *Inst.* 488. 2 *Roll. Abr.* 295. *pl. 3.* If a person is cited in the *Spiritual Court* for calling a woman a whore, within the city of *London*;

as it is there actionable, a prohibition always goes. It is allowed indeed, that the *Ecclesiastical Court* may proceed to deprive, for an offence punishable at common law, but not to punish. Where the parliament had a mind to save the ecclesiastical power in a statute, there they expressly saved it; as 10 *Ann. c. 11. s. 26.* and several other statutes. And so it appears by Sir T. Jones 131. 11 *Co. 16. 2 Inst. 659. Hard. 116.* But in this case here is a temporal penalty inflicted, for the offence of marrying without banns or licence, by statute 7 and 8 *Will. 3.* which has not saved the power of the *Spiritual Court*; and therefore we hope their power is taken away, and that the prohibition shall stand.

*Cur.* said nothing to it, but ordered it to be argued again.

*For the remainder of this case, see table of the names of the cases.*

*Brassey, and others, v. Dawson, and others.*

*Stran. 978. S. C.*

- [65] **T**ROVER by plaintiffs, assignees under a commission of bankruptcy, against the defendants, commissioners of the land tax, on this case; one *Fairclough* was a collector of the land tax, and had collected a great deal of money for the public use; and on *July 7, 1731*, absconded, and became a bankrupt; and on the 16th of the same month and year, the commissioners issued their warrant, and seized his goods, &c. On the 17th of *July*, a commission was taken out, and assignees appointed. On the 21st of *July*, the goods were assigned to the assignees. On the 22nd, they were taken away by the defendants: and on the 26th of *July*, they were sold by them for

Warrant from commissioners of the land tax to seize the goods of the collector for money in his hands, shall be deemed an extent, and be good against the commissioners of bankrupt, tho' the bankruptcy was committed before the goods were

seized: but in the case of a private person, it is otherwise.

ready money. This case was tried before lord *Raymond*, and a verdict given for the plaintiffs subject to the opinion of this court.

Mr. Serj. *Darnel*, for the plaintiffs. The only question in this case is, whether the act of bankruptcy so took away the property of the goods, before assignment, as to make them cease to be his.

Ch. Just. If an extent be issued out, nay only tested, before the goods, &c. are assigned, that extent will be good.

Serj. *Darnel*. That is a prerogative case, but this is the case of a private person; and is like the case of an administration granted, which vests the property of the intestate's goods in the administrator, from the time of the intestate's death. In *C. B. in London, Pasch. 3 Geo. 2. Andrew and Sir Matthew Decker*, a case tried at *nisi prius*, before Ch. Just. *Eyre*. The action was brought against Sir *Matthew*, for a false return to a *fieri facias*, viz. *nulla bona*. It appeared on evidence that goods of the defendant, were in the house at the time of the return; but that the party, whose goods were to be taken, became a bankrupt before the writ was delivered to the defendant, and that a commission was issued out against him; but that his goods were not assigned over by the commissioners. The commission was held to be a sufficient proof of his being a bankrupt, and the return was held good.

Ch. Just. I own this is contrary to my present notions of the law in that case.

Serj. *Eyre*, for the defendants. This case concerns the crown; and therefore the property is not altered till assignment, and an extent in aid executed before the assignment, is good. So is *3 Keb. 14*. The crown is not bound by statutes, relating to

[66] bankrupts. So is Sir *W. Jones*, 203. An extent, and a warrant from the commissioners of the land-tax, alters only the manner of the collecting the money of the crown. By statute 3 *Geo. 2. c. 1.* fol. ed. p. 59. If any collector refuses to pay the money which he has collected, any commissioner may commit him and seize his estate. And this is a new law, and shall controul all the former resolutions. 3 *Lev.* 69, 191.

Serj. *Darnel*. I agree the property of the bankrupt's estate, does not vest in the plaintiffs till the assignment, so as to give them an action; but when that is made, it gives them by relation, a property from the time of bankruptcy. This case concerns not the crown; for by statute 3 *Geo. 2.* it appears that the seizure of the collector's estate is for the benefit of the parish; for the parish is answerable for the money at all events; therefore the parish is to return to the commissioners substantial men of the parish, to be collectors and assessors; and the money collected does not become the crown's, till it is paid into the hands of the receivers; for they give security to the crown.

Ch. Just. In this case are two questions, the first is, whether this be the case of a private person, or of the crown. Secondly, if this be the case of a private person, what effect an act of bankruptcy has on those goods in this case, before an assignment. In the case of a private person, there is no actual vesting of the bankrupt's estate, before assignment; because the commissioners have only the power of disposal; but after assignment, they vest to many purposes, by relation in the assignee, from the time of the bankruptcy: as to avoid acts done by the bankrupt himself, &c. and therefore I think, if a judgment be given against one, before bankruptcy, and the exe-

cution be compleatly executed, by sale of the goods, and payment of the money over, before the assignment, that the execution will be good. But if this at bar, be the case of a private person, the execution is not compleated, for the goods were not disposed of by the officer before the assignment; and then I think this commission will over-reach it. So the question is, whether this is a prerogative case, and I think it is; for though the money when levied, is to be applied to the public use, yet 'tis always considered as the money of the crown; and therefore 'tis always recovered by the prerogative power. And I think 'tis hard to imagine that the summary remedy given to the commissioners by statute 3 *Geo. 2. c. 1.* should put the crown in a worse condition than it was in before. And if an extent in this case had been sued out, the goods would have been bound, even from the teste of it, and no relation could have avoided it: and the crown cannot come in as a creditor; as it cannot be affected by the statute relating to bankrupts. So the question is, whether this warrant can have the same effect as an extent would have had. As to the parish being liable, that makes it not less the money of the crown than before, for that is only giving the crown a double security for the money. And in the case of *Rex and Norton*, in the *Exchequer*, it was held that an extent executed after assignment would be good.

The other judges said little or nothing to it, only [67] *Lee* said, that *Salk. 111.* was contrary to *Andrew's* case, cited by Serj. *Darnel*; and *per Cur.* it was ordered to stand over.

Afterward, Mr. *Strange*, for the plaintiffs argued, that the goods seized by the commissioners of the land tax, ought to be the proper goods of the collector, as

appears by the statute 3 *Geo. 2. c. 1. fol. ed. p. 59.* but on the 16th of *July*, these were not the goods of the bankrupt, because he became a bankrupt on the 7th of *July*; and it is every day's practice to over-reach executions, as in case of the subject, by relation of a precedent bankruptcy, pursuant to statute 21 *Jac. 1. c. 19. 3. Lev. 69, 191.* Bankrupts are considered, in the eye of the law, as criminals; and cannot alienate or transfer any property, from the time of the bankruptcy. But supposing the property was only in abeyance, as in the case of an intestacy before administration granted, that will be sufficient for our case; for then it could not be said they were the bankrupt's goods, if this be the case of the subject. The next question is, if here there be any intervention of the prerogative; for if it be the debt of the crown, and the warrant of the commissioners is to be taken to be equal in power to an extent, then I must allow that it is against us; though the execution was not completed by sale of the goods, before the assignment. But the collector is not a debtor to the crown; for the division is charged with the money, and not discharged, till it is paid into the hands of the receiver general; and the collector is only as a middle man, and it is indifferent to the crown, whether the collector has it or not; for the division must make it good. If the act had intended an immediate remedy against the collector, then it would have provided that the receiver general should take what he could from the collector, and the rest from the division: but now by express declaration in the act, the money raised in the collector's hands, is no payment to discharge the division, till it is lodged in the receiver general's hands. By which it is plain, that the crown did not intend to look upon the collector



as any officer of his ; and the crown here can receive no detriment, for by assessments and reassessments, the money may be recovered of the division. The receiver general is the crown's debtor, because, when it is paid into his hands, the crown can come on no one else. But if the crown has its election of resorting either to the collector, or the division, as a double security, then it is to be considered, whether the warrant of a commissioner of the land tax, be equal to an extent. An extent is a matter of record, an ancient common law writ ; and binds from the *teste*, in the case of the crown ; notwithstanding the statutes of frauds and perjuries. But the warrant of the commissioner is a mere matter in *pais* ; and that is a plain declaration, that it is not given in favour of the crown, but the division.

Mr. *Morton* for the defendants cited 1 *Salk.* 108. 1 *Vent.* 360. Sir *Thomas Jones* 196. The collectors are appointed by the commissioners, not by the division, as appears by the act ; and the collectors, as to this purpose, are the king's servants, and the instant the money is paid into their hands, it becomes the money of the crown ; and though the division be to make it good, yet that does not make it to be their money. But where the king has been only nominally concerned, and not in interest, yet the prerogative has taken place. So is *Show. Parl. Ca.* 72. 2 *Roll. Abr.* 158. *Hob.* 222. [68]

The court said they would consider of it.

Afterward, the chief justice delivered the opinion of the court in this case, to this effect.

The general question in this case is, whether, by the assignment made by the commissioners of bankrupts to the plaintiffs, the assignees, on the 21 *July* 1731, the property of the goods, &c. passed to the

plaintiffs or not. For if they did not pass to them by this assignment, then they can have no title to them. And we are all of opinion, that the property of the goods was not vested in the plaintiffs, the assignees under the commission of bankruptcy. Upon this arises two questions. First, in whom these goods would have vested in this case, supposing it to be the execution of a private person; and secondly, if this be the case of a prerogative execution or not; and what will be the consequence of that. As to the first question, in whom those goods will vest, supposing it to be the case of a private execution, we are clearly of opinion, that, in this case, the goods would have vested in the plaintiffs, the assignees; and that depends on the construction of the statute 13 *Eliz. c. 7.* and 21 *Jam. c. 1.* 19. and that construction has always been, that those statutes give a power to the commissioners over the bankrupt's estate; but that they do not vest his estate in them, as appears by the resolution of the whole court in the case of *Perry and Bowers*, in *Sir Thomas Jones*, 196. But after the commissioners have executed this authority by the assignment, all the estate of the Bankrupt then vests in the assignees, by relation to many purposes, from the time of the act of bankruptcy committed, so as to avoid all mean acts made by the bankrupt himself, &c. And therefore, if an execution be not executed before the bankruptcy, the assignment by relation shall defeat it, as appears by the case of *Cole and Davies*, *Hil. 10 Will. 3.* in *B. R.*, *Ld. Raym. p. 724* and the case of *Philips and Thompson*, 3 *Lev.* 69, 191. which goes farther than that case. And in *Salk. 111.* *Kiggil and Player*, *Holt*, Ch. Just. says, that the assignee is in by relation, from the time of bankruptcy, so as to avoid all mean acts; but not so as to be actually

invested with the very property. And though the assignment thus operates in the case of private persons, yet the property of the goods, before the assignment, is not in abeyance, nor in any one but the bankrupt himself, as appears in *Salk.* 108. And this is a clear authority, to prove that the commissioners have only a power, and no interest, in the bankrupt's estate. But the second question is the most material one; and we are all of opinion, that [69] this warrant from the commissioners of the land-tax, is not to be considered as an execution of a private person, but of the crown. And first it is to be considered whether the money in good hands, collected for the land-tax, and before the time of his becoming a bankrupt, is to be looked on as the king's debt or not. And on the last argument, several objections were made against its being considered to be the debt of the crown; as first, that the bankrupt was not a servant of the crown. Secondly, that the receiver general is the only person whom the crown in this case considers as a debtor; and that till it is paid to him, it is not the money belonging to the crown. 3rdly, That if any persons are liable to the crown, before the money is so paid into the hands of the receiver general, it is the parish, or division, which must be looked on as debtors to the crown; and not the collector. Fourthly, That the collector is answerable to the parish, or division, and not to the king; for that they are answerable to the crown. But these objections will receive an answer, from considering the land tax act made 3 *Geo. 2* in the year 1730, the year before *Fairclough* became a bankrupt. And by that act, in pages three and four, the land-tax is granted to his majesty; and the subsequent pages point out the several Sums, and the

manner of collecting them. In page eighteen, the parish, &c. shall name two or more able persons, to be collectors; for which they shall be answerable: and the commissioners are to nominate and appoint them to be collectors. And in page nineteen, the collectors are required and enjoined to collect the money so charged, for his majesty's use. In page twenty-one, the collectors are to have a three pence in the pound allowed them, for the sums which they collect. Page twenty-five gives the commissioners power to seize the estates of the collectors, for the money received and detained in their hands; and page fifty-eight, gives the commissioners power to summon the collectors who have gathered the land-tax money to their own use, and may issue their warrants to them, to pay such money to his majesty's use: and in page fifty-nine, it is declared, that such payment shall be a good discharge to the said collector, against his majesty and his successors, and all other persons whatsoever. So that it appears by this act, that the duty is vested in the king; that the collectors are appointed by the commissioners; and that their salary is likewise paid by the king, out of the money collected; and that they on payment of the money, are discharged against the king and his successors. And who then, upon the whole, can doubt but that the collector of the land tax, is an officer of the crown; and that the parish is only to be considered as a double surety to the king, for the payment of the money.

[70] Now it is to be considered what was the effect of the seizure of the goods of the bankrupt, on the sixteenth of *July*, by virtue of the warrant from the commissioners of the land tax. It is agreed on all hands, that if this was to be considered to be the

debt of the bankrupt, to the crown, and that an extent had issued before the assignment, that the property of the goods would have been bound by the extent. But it was said, that this warrant from the commissioners was an act in *pais*, and not equal to an extent, which is a matter of record. And I admit that this warrant is not equal to an extent, which issues out of the court of *Exchequer*, so as to bind the estate from the date of it, which an extent will do. But that is not the point; for the foundation on which we go is this, *viz.* That before the bankrupt's estate was assigned to the assignees, it appears that his goods were actually seized by virtue of this warrant; and the subsequent assignment cannot divest the crown of this seizure, for three reasons, First, Because the goods were such as in their nature were seizable. Secondly, because the crown is not bound by the statute of bankrupts. Thirdly, Because the relation, on the assignment, cannot bind the crown. As to the first reason, it is made evident by the land tax act of 3 *Geo. 2.* and the cases which have been cited say, that the goods seized shall be the bankrupt's. And the case in *Salk.* 111. says, that the property of the bankrupt remains in him, till after the assignment; and the other cases prove the same.

As to the second reason, it appears in *Sir W. Jones* 202. That the crown is not bound by the statute, unless expressly named. And it is further proved by all the cases which have been cited, relating to the extent of the clause in the statute 21 *Jac. 1.* concerning bankrupts. So likewise, by the case of *The attorney general and Lewis* in the *Exchequer*, cited in 2 *Show.* 481. and by 1 *Dyer* 67 b. 2 *Roll. Abr.* 159. pl. 8. *Lane* 65. And therefore the statutes relating to bankrupts do not extend to the crown. The only rea-

son why an extent cannot reach the estate of the bankrupt after the assignment is, because, that then the property of the estate is vested in the assignees, and so out of the bankrupt: And then extent cannot affect the property of a third person.

The third reason appears from this, that relations are fictions in law, and shall not take place against the crown, as it is held in *Hob.* 339. and the statute 13 *Eliz.* and 21 *Jac.* 1. already cited, plainly shew it: for the relation in the case of a private person, upon an assignment, takes place only by virtue of those statutes. But the crown is not bound by the statutes; and therefore shall not be bound by those relations which they create. It may be objected, that the law cannot here be thus, because the execution was not compleated by sale of the goods, &c. before the assignment. But I answer the execution was compleated here before the sale, by the seizure of them: for the seizure and the sale are two different things; and on the seizure, the goods are in the custody of the crown: so that no one can take them out of his custody, the execution being compleated, as appears by Sir *William Jones*, 202. *Cro. Car.* 148. S. C. which cases were between common persons, where the act of bankruptcy has the same effect between them, as the assignment has in the case of the king. And by the statute 3 *Geo.* 2. the commissioners have power to seize and detain the goods; so that the cases above, relating to private persons, are applicable to this. And the same interest, which, in the above cases, the private persons have in goods upon gage of distress, the crown has over the goods of the collector, upon his seizing them, before they are sold, that is, that they are irredeemable, but upon payment of the money, for which they were so seized.

Therefore, for these reasons, we are all of opinion, that the plaintiffs ought not to recover in this action; and therefore they must pay the costs of a nonsuit.

*Note*, Mr. *Moreton* then said, they were, in this case, intitled to treble costs. But the Ch. Just. said, he should take an opportunity of moving it another time, that they might consider whether they ought to be given or not.

Afterward Mr. *Moreton* moved for treble costs in this case, upon the land tax act, and it was granted; the Ch. Just. being absent. But the court objected against the method of applying for these costs by motion; for being after a verdict, they seemed to think that it ought to have been suggested on the roll. But

Mr. *Strange* for the plaintiff said, that if it was the opinion of the court, that treble costs ought to be paid, it was not worth his client's while to contest the manner of it, and therefore submitted to the above rule without argument.

*Tryon, v. Carter. Stran. 994. S. C.*

Debt on bond for payment on or before the fifth of December, and plea of payment at the day; replication that the defendant did not pay it on the day held ill, not saying that he did not pay it at any time before.

THIS was a writ of error on a judgment for the plaintiff, after a verdict on a bond; of the condition of which oyer was prayed. And it appeared to be, that, if the defendant paid so much on or before the fifth of December, next ensuing the date thereof, that then, &c. and the defendant pleaded payment, on the day mentioned in the condition. The plaintiff replied, that it was not paid on that day, and the jury found that the defendant did not pay the money on the twenty-fifth of December, as mentioned in the replication. The court, on argu-

ment, held that the word *twenty* in the verdict ought to be rejected, as repugnant, because it referred to the replication, which mentions only the fifth of *December*. But doubted much, as the case is pleaded, whether the judgment ought to be affirmed or not, for that, as the consideration of the bond was for payment of the money, on or before the fifth of *December*; so that this being a disjunctive condition, in which the defendant had liberty to pay it before the day; the finding of the jury, that he did not pay it on the day, seemed to be immaterial: and on the other [72] side, as the defendant had several times of payment; and he has chosen to put himself upon the last period of time; it may be objected, that by so pleading he has debarred himself from taking advantage of the proof of payment before the day: and therefore *per Cur. adjournatur propter difficultatem*.

*For the remainder of this case, see table of the names of the cases.*

*Dominus Rex, v. Smith. Stran. 982.*

S. C.

**M**OTION had been made by the father and mother of *James Smith* (a boy under fourteen years of age) for an *habeas corpus* to be directed to *Penelope Smith*, the boy's aunt, and in whose keeping he was; to bring up the body of their son, in order to have him delivered over to them. The aunt now came into court without any manner of justification for the detention of him.

Mr. *Brook* prayed that the boy might now be set at liberty from his aunt, and that he might be delivered over to the custody of his father and mother;

On a *habeas corpus*, the court will not determine the right of guardianship, but set the child at liberty.



for that they are, by nature, guardians of their children; and that this boy is so young, as not to be capable of choosing a guardian for himself, though his own father was dead. In the Lord *Berkeley's* case, lord Ch. Just. *Pemberton* said, we cannot deny Lord *Berkeley* the custody of his own daughter. 3 *Vol. State Trials*, 539.

*Lee*, Just. In page 540, the Ch. Just. said, my lord we do not hinder you, you may take her. But note, that was after one *Turner* claimed to be married to the lady.

Mr. *Bracknell* on the same side. In the case of *Rex, v. Johnson*, Hil. 10 Geo. 1. [*Stran.* 579. lord *Raym.* 1334.] *Johnson* was in custody of the guardians appointed by the *Spiritual Court*; and by an *habeas corpus* brought by the guardians of the defendant appointed under the will of the father; the child was taken out of the custody of the former, and delivered over to that of the latter.

Serj. *Chapple*, *contra* cited 2 *Lev.* 128, where the court denied to deliver over a young lady to the custody of her aunt, who was guardian in-law to her; and said, that this boy was never confined; and that he always has, and now is, at his own liberty.

Ch. Just. The aunt here made no return, but that she has the boy in court; and therefore, as she makes no excuse for detaining him, he must be set at liberty. But the question here is, whether we can go farther, and deliver him over into the custody of another; and I am not satisfied that we can do it. The general rule, in cases of this nature, is, that the court sets the party at liberty, but does not deliver him into the custody of another. [73] And so is the case in 2 *Lev.* 128, in *Lady*

*Catbarine Annesley's* case, cited 2 P. W. 112. the court would not deliver her over to her mother, though the father was dead. The case of *Rex* and *Johnson* is the only one, which seems *contra*. And though I have great respect for the persons who gave that judgment; yet it is a single case, and seems to be carried too far, and my reasons for it are these. The *habeas corpus* is a writ calculated only for the liberty of the subject; and does not give this court any authority to try and determine private rights on it, as the right of guardians is. And if we determine this right upon this writ, the parties are ever concluded from any appeal, or writ of error on it. And the father, in this case, has several other remedies, to obtain the custody of this child. For, First, he may take him wherever he finds him. Secondly, He has his legal remedy, by bringing his *quare filium rapuit*, where he may recover his damages. Thirdly, he may bring a writ of Ravishment of ward. Fourthly, A guardian may bring his action *de ejectione custodiæ*, in which the very right of guardianship comes in question. And at present I do not see why the father likewise, may not bring the same writ. If we grant this motion, we do not only set the boy at liberty, but we likewise send him into the custody of another person. Whereas, by the course of the court, if a person in custody of any other gaol, has an indictment preferred against him in this court, the party is brought up by *habeas corpus*, and taken out of the custody of that gaol. But he is not turned over to the prison of that court, by force of that same writ, but by a rule made for that purpose. But where there is no indictment, &c. in this court, then there must be sued out a *habeas corpus*, one *ad delibendum*, and the other *ad recipiendum*. But accord-

for that they are, by nature, guardians of children; and that this boy is so young he is not capable of choosing a guardian for himself, his own father was dead. In the Lord *Ch. Just. Pemberton* said, we cannot *bestow* the custody of his own daughter. *State Trials*, 530.

*Law, Just.* In page 540, the *Ch. Just.* said we do not hinder you, you may have that was after one *Turner* claim that in the last.

*Mr. B. moved* on the same side.

*Lord Ch. Just. 10 Geo. 2. B.*

*9. Nov. 1734.* *Turner* was in custody.

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Debt against an executrix; plea of a bond and judgment thereon; replication that it was obtained by fraud, and that the testator left assets; and on demurrer, the replication held good; for the allegation of assets is only a conclusion from the fraud alleged.

plaintiff in error argued, that  
 bad; for that it set forth par-  
 fraud, and did not in general say,  
 was kept on foot by fraud; and  
 could have relied upon this point,  
 assets; and that this manner of  
 as appears from *Thompson's Entr.*  
 17, 8. 180. *Vidian's Entr.* 175,  
 3 Salk. 208.

ing to the resolution of *Johnson's* case, there was judgment *ad deliberandum et recipiendum*, upon the same writ; which I think ought not to have been; and that on such a writ, we have no power to determine the right of guardianship. And for these reasons I think the child ought to be delivered out of the custody of the aunt; and that then he ought to be at liberty to go where he pleases.

*Page, Just.* I think, that on this writ we have nothing to do with the right of guardianship. For on this writ we are only to examine whether the person be legally detained or not; and if we find he is not, then we are to deliver him and set him at liberty, and can go no further. But in case it appears the party is not detained by force (as this boy is not,) I do not see we have any thing to do with him at all.

*Probyn, Just.* I am of the same opinion.

*Lee, Just.* *Johnson's* case was much debated, and the point of the delivering over of the child to the father, was then considered. But as to the authority of that case, one of those, who then sat as judge in that case, has since told me, that he was not satisfied with the judgment; and that looking into the books since that, he has found, that the former practice, was always contrary to this resolution. [74]

*Ch. Just.* Then asked the boy, who he lived with; the boy answered, *with my aunt.*

*Ch. Just.* Are you willing to live with your aunt? Yes.

*Cur.* Thereupon gave the rule, that the boy should be discharged out of the custody of his aunt, and that he should be at liberty to go where he pleased.

Ward, v. Ward.

**E**RROR out of *C. B.* on a debt on a bond by a creditor of the defendant's husband, to whom she was made executrix. She pleaded, that the testator, her husband, on the twenty-first of *August*, 1729, was bound to *Hugh Boswell*, in a bond of one thousand pounds penalty, for a just debt; and that in *Hil. Term* last, he recovered judgment against her upon this bond, and that she had not assets *ultra*. The plaintiff replied, that the bond was not made for a just debt; but on condition, that if the testator would suffer his wife, if she died without issue by him, by deed, or last will, in writing, to give and dispose five hundred pounds to whom she should appoint; and in case he, or his executors, should cause it to be paid, that then, &c. And then set forth, that the defendant had not made any such appointment: and that the judgment was suffered to remain in force, to defraud him of his just debt; and then said that the testator left assets. To this replication the defendant demurred, specially shewing for cause, that it contained double matter, *viz.* fraud and assets. There was a joinder in demurrer, and judgment for the plaintiff.

Debt against an executrix; plea of a bond and judgment thereon; replication that it was obtained by fraud, and that the testator left assets; and on demurrer, the replication held good; for the allegation of assets is only a conclusion from the fraud alleged.

Mr. *Denison*, for the plaintiff in error argued, that the replication was bad; for that it set forth particular evidence of fraud, and did not in general say, that the judgment was kept on foot by fraud; and that the plaintiff should have relied upon this point, and not have replied assets; and that this manner of replying is wrong, as appears from *Thompson's Entr. Liber placitandi* 157, 8. 180. *Vidian's Entr.* 175, 182. 1 *Saund.* 336. 3 *Salk.* 208.

*Mr. Filmer*, for the defendant in error, cited 2 *Saund.* 219, and said, that the case there was much more double than this, and yet held good.

*Ch. Just.* As to the substance of this case, if the condition of this bond was not broken, then it was properly replied, that she suffered judgment to go against her by fraud. The appointment was to be made by her, before the death of her husband, which she had not done; so the replication is good in substance. Then as to the allegation of assets, it is not made a distinct defence, but seems only to be by way of conclusion, from the first part of the replication, [75] and then it will not be bad; and I think it ought to be considered so.

*Page and Probyn. Just.* Of the same opinion.

*Lee, Just.* The replication of assets is nothing but a natural allegation, consequent on the first part of the replication; for if the judgment was obtained by fraud, then there would be sufficient assets to satisfy the plaintiff's demands.

*Cur.* Judgment must be affirmed.

### Robinson, v. Bealby.

Debt brought for the penalty of a charter party, and a breach assigned; *nil debet* is a bad plea, for this goes to the deed itself.

**E**RROR out of *C. B.* in debt on a charter party. Defendant pleaded *nil debet*; and plaintiff demurred specially to it; shewing the inconsistency of it. There was a joinder in demurrer, and judgment for the plaintiff.

*Strange*, for the plaintiff in error, argued, that the plea was well enough; and that a distinction has been taken, where the plea goes to matter in *Pais*, as well as to the deed itself; for in that case *nil debet* has been held to be a good plea to a deed. 6 *Mod.*

127. 1 *Saund.* 38. and this is an old distinction, as appears from the book, 21 *H.* 7. 14.

Mr. *Denison*, *contra*, said that this was a plea to the deed itself; and that such has been held to be ill, appears from the case of *Warren and Consett. Trin.* 13 *Geo.* 1. [*Stran.* 778. *Lord Raym.* 1500, and *Mills*, and *Bond, Mich.* 7 *Geo.* 1. *Stran.* 399.] and that the cases cited differ greatly from this.

Mr. *Strange* then shewed, that with regard to the three breaches, which the plaintiff had assigned, in order to intitle himself to the penalty, there is a variance, in the setting out two of them between the charter party and declaration; and so not well assigned. But Mr. *Denison* said, that this was an action for a penalty; and therefore if one of the breaches was well assigned, it was sufficient for them to recover on it; it being confessed by the demurrer, and the defendant pleaded over.

Ch. Just. The distinction taken by Mr. *Strange*, is certainly right, but this is a plea to the deed itself; and therefore bad. Where a penalty is to be recovered at law, the right way is to set forth one breach; and the setting forth *more* breaches is matter of duplicity; but the defendant in this case cannot take advantage of it, because he has not specially demurred to it, but has pleaded over. Therefore *per Cur.* Judgment was affirmed.



*Rex and Overseers of the Parish of Heaven, [76]  
v. Inhabitants of the Parish of Sand-  
wich, in Kent.*

Lease was granted to *A.* for 99 years; he devised it to *B.* his son, who entered and enjoyed it above 40 days; it was held that *B.* had thereby gained a settlement; for it comes within the same reason as the cases of freehold and copyhold estates; and *B.* having a property could not be removed.

THE case, as specially stated at the sessions, was thus, viz. *Thomas Birch*, by indenture dated 1701, demised a messuage cum pertinent. lying in the parish of *Heaven*, to *Gates* the father, for ninety-nine years; and the father devised it to *Thomas Gates* the son, his executors, administrators, and assigns, upon condition that he paid twenty pounds to the testator's use, in case he should live to expend that money. *Thomas Gates* entered, and was possessed of the messuage, and lived in it more than forty days. Upon complaint by the overseers of *Heaven* parish, that this *Thomas Gates*, his wife, and daughter, were likely to become chargeable to that parish, two justices removed him, &c. to *Sandwich*, the place of their last legal settlement. And on appeal to the sessions, they stated the case specially as above; and that this lease was not worth above five pounds *per annum*, for any thing which appeared to the justices to the contrary; and therefore affirmed the original order, which being removed up here by *certiorari*, Mr. *Strange* moved last term to have it quashed; and cited the cases of *Mursley v. Grandborough*, *Trin. 4. Geo. 1. [Stran. 97.]* which was a lease for ninety-nine years, upon which, only one shilling was reserved; and yet it was there held, that the man who married the woman, who had that lease (it becoming his by the marriage) gained a settlement by it. And *Harrow and Edgeware, Pasch. 11 Ann. 1 Sess. Ca. c. 41. & Foley's Poor Laws 294.* where it was

held that a copyhold estate of twenty-five pounds *per annum*, gained a settlement. And this case was adjourned over to this term, to look into the above cases. And now Mr. *Knowles*, in support of the orders said, that in the case of *Mursley* and *Grandborough*, it appeared to be a beneficial lease; and that one of the four judges was against this resolution; and that this is contrary to the statute of 13 and 14 *Car. 2. c. 12*.

Mr. *Strange, contra*. It cannot be doubted but that a copyhold or freehold, of ever so small a value, gains a settlement, if it comes to the party by the operation of law, as appears by the cases already cited, and by *Salk. 524*. And though in the case of *Mursley* and *Grandborough*, it appeared it was a beneficial lease, yet it was under ten pounds *per annum*; and therefore came within the words of the statute 13 and 14 *Car. 2*.

[77] Ch. Just. This court is tender of removing persons from their own property, though ever so small. And it has been held that in the case of copyholds and freeholds, the party owner shall not be removed from it, though it be ever so little; and I can see no difference between them, and leases for years, unless there be any difference in it, upon the penning of the act. And the meaning of that act is plain, and gives power to justices of the peace only, to remove such persons as come within the description of that act. *Thomas Gates* comes to this lease, under the will of his father, charged as above. And tho' the justices say, that the lease is not worth more than five pounds *per annum*; yet they say, *for any thing that appears to them to the contrary*. But perhaps they never endeavoured to inform themselves; whereas they should have said positively, if that had been the case, that

it was worth no more. So for any thing which appears, the lease may be of greater value. By the case of *Mursley and Grandborough*, it appears, that a lease for years, is as well out of the statute, as a freehold or copyhold; and therefore I think it would be hard to remove this man from his property, and that the order of sessions ought to be quashed.

*Lee, Just.* To be sure this case falls within the literal words of the statute 13 and 14 *Car. 2.* But that statute was made only to restrain such persons from coming into the parish, as are mentioned in the act, and they are vagrant and wandering rogues. The true value of this lease does not here appear; but it appears, that this is an estate, by which the man had a right by operation of law; and therefore I think likewise, the order must be quashed.

*Cur.* quashed the order.

### Dominus Rex, v. Pritchard.

Variance between the name of a juror in the *venire* and *habeas corpora*, not material, if the juror was not sworn on the panel.

THIS was an information in the nature of a *qu warranto*, against the defendant, for exercising the office of a bailiff for the corporation of *Liverpool*. And a verdict being found against him, several exceptions were taken in arrest of judgment; but the only three which deserved answers were these. First, that though the *mittimus* sent down to the *County Palatine*, was directed to the justices of the *County Palatine* of *Lancaster*, yet the *venire* was made returnable, only before our justices at *Lancaster*. Secondly, That *William Hill*, in the *venire*, was called *W. Hill*, in the *habeas corpora*; so that there was a plain variance, and his true name was *William Hill*. Thirdly, that the names of the jurymen are

not inserted in the body of the writ of *habeas corpora*, but in the panel annexed, which ought to have been done, because this must be taken to be a special jury; and so out of the statute 3 *Geo. 2. c. 25.* which orders the names of the jurors, not to be written in the body of the *habeas corpora*, or *distringas*, but to be inserted in a panel annexed to the writ.

[78] Mr. *Boote* answered them severally thus. As to the first exception, I have ordered the precedents to be searched in the *Exchequer*; and most, if not all of them, are, before our justices at *Lancaster*. As to the second exception, *William Hill* was not sworn on the jury, there being sufficient without him, as appears by an affidavit, which I have for that purpose; and so likewise it appears on the *postea*. So that this is like the case, where only twenty-three jurors are returned; and that defect is aided by the resolution in *Gardiner's case*, 5 *Rep.* 37. and by *Cro. Car.* 223. *Cro. Eliz.* 586. *Cro. Jac.* 647. and statute 21 *Jac.* 1. c. 13. And if he had been sworn, this variance had been amendable by the *countess of Rutland's case*, 5 *Rep.* 25 b. As to the third objection, it does not appear upon the whole record, that this was a special jury. But, it is objected, it appears that there was not a sufficient number of jurymen returned; for there ought to have been forty-eight or seventy-two returned, whereas here were only twenty-four. But if there be a defective number returned, then it comes under *Gardiner's case*, and is aided by it.

Mr. *Clayton*, *contra.* to the second objection cited, *Cro. Jac.* 458. and *Cro. Eliz.* 222. But in these cases, the person whose name was mistaken, was sworn on the jury.

Ch. Just. I think there is nothing in the first exception; for though the *mittimus* is directed to the

justices of the *County Palatine of Lancaster*, and the same justices are to try the cause; yet we will not presume, but they did it. And we are bound to take notice of the style of the *County Palatine Courts*, being *Superior Courts*. And it is like the direction to the justices of our lord the king, at *Westminster*, which by way of eminence must be understood, to mean the justices of this court, and not justices of the peace. And it appears by the precedents, which have been produced from the *Exchequer*, and read here, that they are all as this is. And therefore if this was at first a defect in form, yet as all the precedents are so, I should think it well enough, according to the resolution in *Baynham's case*, 5 rep. 36 b. As to the second exception; as this jurymen was not sworn in the cause, the variance is not material; for it cannot be said, there was a mistake in the name of the man, who tried the cause; and the cases cited are where the party tried the cause. But if this had been faulty, I do not think it would have been amendable, by statute 21 Jac. 1. for that it should have been amended at *nisi prius*. So that this comes under *Gardiner's case*, where it is held twenty-three jurors are sufficient. As to the third objection; though the jury are called in the *habeas corpora*, special jurors; yet I do not think that we are obliged to take notice that these words import that this was a special jury. And if it had been before the act, I should have been very clear that it ought not to have been so understood, for that the term was then unknown to the law; though the late statute for the better regulation of jurors, had now made it a legal term. But if we must understand this to be a special jury, then it is certainly out of the act 3 Geo. 2. which takes away the method of inserting the names in the *habeas corpora*,

[79] as appears by the resolution in *Franklin's case*, 2 *Barn. K. B.* p. 106. where it was held, that this act did not extend to special juries. And then this case will be governed by the rules which ought to have been observed in the cases of writs of *habeas corpora*, at common law, before the act. And I think that this form would have been good at common law, after verdict. For an *habeas corpora* is a judicial writ, and therefore can have no certain form; for if it be good in substance, it is sufficient; and not like the case of original writs, where a variance from the register is fatal. And here being a panel annexed to the writ of the names of the jurors; it is like the case of writs to which schedules are annexed, which are taken to be part of the writ. But supposing this to be defective, it is only in form, and aided by statute 18 *Eliz. c. 14.* and by statute 9 *Ann. c. 20. s. 7.* All the statutes of jeofails are made extendable to these informations. But supposing it to be a common jury, then the number of jurors should be such as are required under statute 3 *Geo. 2.* which is forty-eight and seventy-two. But that will be only a want of number; and the act says, the sheriff shall return so many and no more, without direction of the judge appointed to go the circuit and sit as a judge; who is required, if he sees cause, by order under his hand, to direct a greater or lesser number: and here may have been such directions, which is often very necessary; as in places where they try but very few causes. Therefore, upon the whole, I think this judgment should not be arrested.

*Probyn, Just.* I think the names should be inserted in the *habeas corpora*, and that the panel annexed would not help it, because it did not appear, but that the writ was sealed, before the panel annexed, which last was the act of the sheriff.

Ch. Just. The words of the writ, refer to the panel annexed, which must be there at the time of the writ's being sealed; and so the panel must be taken to be annexed to the writ, at the time of the sealing it.

*Probyn*, Just. I allow, if the panel must be looked upon to be annexed to the writ, at the time of sealing it, that it may be well enough. But I think that the direction of the judge to limit the number of the jurors, should appear on the writ; for otherwise we cannot presume any particular directions.

*Lee*, Just. This being a motion in arrest of judgment, we cannot go out of the record, but must adjudge upon it. And therefore I do not know whether this last exception is proper upon this motion; because, if this is not a special jury, then there is no occasion to insert the names in the *habeas corpora*. And I do not think that the words *special jurors* are a sufficient evidence that this was a special jury. Therefore, this seems to me to have been a proper foundation for a motion for a new trial, where this fact might have appeared to the court, whether it was a special jury or not. So likewise, as to the direction of the judge, by that way, the fact would have appeared.

Upon this variety of opinions, the matter was adjourned, for the consideration of the court. And the last day of the term the Ch. Just. said he had [80] considered of it, and had no reason to alter his former opinion; and the other judges now agreeing with him, the rule to shew cause why the judgment should not be arrested, was *per Cur.* discharged.

**Dominus Rex, v. Inhabitants of Brackley.**

**T**HIS was an order of sessions, made upon the disbursements of the overseers of the parish; and several exceptions had formerly been taken to it; but at last it was agreed, that the only material one was this, that the sessions here have made an original order in this case, which they cannot do, for they say that this order was made upon an appeal from the disbursements of the church-wardens and overseers, and the allowance thereof, without saying by whom they were allowed, whether by two justices of the peace, or not, as they ought to have done. It was, at last, agreed on all hands, that the sessions have not an original jurisdiction in this case. But Mr. *Strange* argued that the words *allowance thereof*, sufficiently imported that it came before the sessions by appeal from two justices. And to shew that such general way of setting forth their jurisdiction has been held to be good, he cited the following cases. *Rex, and Inhabitants of Bicham, Hil. 7 Geo. 1.* [*Stran. 411.*] which was an appointment of collector of birth and burial duties, under statute 6 and 7 *Will. 3. c. 6.* which act says they shall be appointed for a year; and though the order did not say so, yet it was held good. *Rex, and Inhabitants of Little Dean, Trin. 9 Geo. 1.* [*Stran. 555.*] special order, which stated that a man came into a parish, and took a lease for seven years; and though not said it was by indenture, yet the court would not suppose it to be by parol, or any way, so as to make it bad. *Rex, and Inhabitants of Aldermanbury, Trin. 4 Geo. 1.* [*Stran. 96. 1 Sess. ca. p. 139.*] there it was not said,

Justices at sessions have no original jurisdiction concerning the overseers' accounts; but it must come to them by appeal.



that the appeal was made by the parties grieved; yet this court would not suppose it to be made by any others. And in orders of removal, the justices only say, that the parties come to settle there, not being qualified according to law; and do not set forth the particulars of his not having lands, tenements, &c. So in the case of adjudication of the last legal settlement, it is sufficient for the justices to say generally, that they do adjudge such place to be the last legal settlement. So in the case of wages, though the justices have only power over the wages of husbandry; yet if the order is made generally, this court will not presume they are for any thing else.

*Mr. Marlb. contra.* This is an exception in the very point of the justice's jurisdiction; whereas the cases cited relate only to the form of their proceedings. [81] And there is no case which comes up to this, but that case of the ordering the payment of wages; and the reason of that allowance is only in favour of husbandry. But there the justices have cognizance of some sort of wages. But, here in the principal case, the sessions have no manner of jurisdiction, unless it comes before them by appeal; and the words *allowance thereof*, will not help it; for their jurisdiction is not to be supported by intendment.

*Ch. Just.* The sessions, in this case, have no jurisdiction, but upon an appeal to them, from the order of two justices. The question therefore is, whether the words, *and the allowance thereof*, are sufficient to make it appear to this court, that this was so made by them, on appeal from the two justices; and I think they are not. For it is not necessary that the accounts of the church-wardens and overseers, should be passed by two justices: for if

they are passed before the parishioners, and allowed by them, it is sufficient to bind them. So it does not appear, but that this might have been such an allowance. The cases cited do not relate to the manner of setting out the jurisdiction, excepting that of the wages, and that is a strong case. But in that case, there is a species of wages; and that resolution was made in favour of husbandry. The word *allowance* is not mentioned in the whole act. If it had, then perhaps it might have been taken to be a technical word of statutable allowance. But here there might have been an allowance by the parish, and not by two justices, and therefore I think the order ought to be quashed.

*Page*, Just. I am of the same opinion.

*Probyn*, Just. The case of the wages does not govern this at all; for there the justices have a jurisdiction over wages. But in this case, it is not necessary to state that the appeal came from two justices; and then the sessions have no power at all.

*Lee*, Just. I think the sessions have no original jurisdiction in this case, and I found my opinion on case of *Rex* and *Martin*, in *Carth.* 58, which case, I think, in effect, determines this. But I doubt, as to the manner of entering the appeal; for it appears here has been an appeal: for it is said, upon an appeal from the disbursements of the church-wardens, and the allowance thereof. And the case of *Rex* and *Aldermanbury*, is to be considered; for the manner of setting forth appeals is often litigated; and this seems to me imperfectly set out; for this allowance may have been by the parish, and not by the two justices.

*Mr. Masterman* informed the court, that all the precedents were, on appeal and allowance of the two justices; whereupon the court would have quashed

it; but that they took time to look into the case of *Rex* and *Aldermanbury*.

### Hoar v. Gates.

Whether in pleading it can be averred that a bill of *Middlesex* was sued out in the vacation.

**T**HIS case was first argued in *Hil. Term, 7 Geo.* [82]

2. by Mr. Serj. *Chapple*, for the plaintiff, and Mr. *Reeve* for the defendant, in the manner following.

Serj. *Chapple*. This is an action of *assumpsit*. The defendant, with leave of the court, pleaded double, viz. *non assumpsit*, and *non assumpsit infra sex annos*. The plaintiff replied, that a bill of *Middlesex* was sued out in *Hil. Term*, and that continuances were entered down till the time of declaring. The defendant rejoined, that the bill of *Middlesex* was, *in rei veritate*, sued out in the vacation, after the term mentioned in the plaintiff's replication; and that the defendant did not promise within six years, before the suing out such writ. The plaintiff demurred, and the defendant joined in demurrer. Now the rejoinder is ill; for a bill of *Middlesex* and *Latitat*, are always considered as originals; and the judgment of the writ is always taken from the *teste*, not the time of suing it out; and this being matter of record, ought not to be averred against. *Lutw.* 333. 1 *Sid.* 53, 60. *Styl.* 156. *Carth.* 232. *Show.* 353. 4 *Mod.* 129. *Cro. Car.* 264. All writs are awarded by the court. *Sid.* 271. 1 *Rel. Abr.* 893. 1 *Mod.* 188. *Cro. Eliz.* 181. It would be absurd to aver, that judgment was given in any other than term time. 3 *Lev.* 28. *Carter* 227. *Hob.* 156. An averment is vain if the law says the contrary. *Hob.* 297.

Mr. *Reeves* for the defendant. The rejoinder is good, being an answer to the replication of the plaintiff,

and is to avoid the statute of limitations. The replication is, that the plaintiff did sue out a bill of *Middlesex* in *Hil. Term*, and that he continued it down to the time of declaring; which is a matter of fact. The defendant rejoins, that the plaintiff did not sue it out in *Hil. Term*, but in the vacation after, which is likewise a matter of fact; and if well pleaded, it is confessed to be true by the plaintiff's demurrer. In a bill of *Middlesex* there never is a *teste*, (though there is in a *latitat*.) But if the *teste* of the *latitat* be not set forth, the court will not take notice of it. Suppose a man is to be arrested in the vacation, and afterwards a writ is taken out, tested of the precedent term, that may not be pleaded in justification of false imprisonment. 2 *Keb.* 173. 3 *Keb.* 213. The cases cited by Mr. Serj. *Chapple*, are all of *latitats*.

Serj. *Chapple*. This fact is not confessed, because it is not well pleaded. We have averred it issued in term time.

Ch. Just. I take it the *teste* of a writ, is a matter of record, and ties the party down, by way of estoppel, from averring against it. The statute of limitations was made for the peace and quiet of mankind; and that persons who have a right to sue, may do it before the party's witnesses are dead, &c.

[83] *Page*. The case cited by Mr. *Reeves* out of *Kemble*, seems very strange.

*Lee*. The true merits of this case is, whether on this record, the defendant is estopped. It appears the time of suing the defendant is elapsed.

*Cur.* Let it stand over.

This case was again argued by Mr. *Parker* for the plaintiff, and Mr. *Strange* for the defendant.

Mr. *Parker* cited 1 *Saund.* 298. 1 *Roll. Abr.* 893.

Mr. *Strange*. The statute 5 and 6 *Will. 3. c. 21.* directs the officer to mark the day of the *teste* of writs, to prevent the abuses by arrests; and therefore this court must take notice, that in fact, the writs may be taken out in the vacation, because that there is a proper officer of this court, appointed for this purpose. By 1 *Ventr.* 362. Sir *Thomas Jones*, 149. S. C. The plaintiff may declare on a *latitat* sued out at a time different from the *teste*. And by *Raym.* 161. and 2 *Keb.* 173, 198. Relations shall neither work a wrong, nor justify one. And 3 *Keb.* 213. allowed, the statute of limitations has given an averment in this instance; for it is there said, that no action shall be commenced or sued, but within six years. And the words *commenced* and *sued*, are not synonymous terms; for each word has its particular use and application. And in this case the writ appears not to have been sued within the six years. And it appears by the case of *Waring and Dewberry*, *Trin.* 4 *Geo.* 1. [*Stran.* 97.] That relations shall take effect to defeat a wrong, but not to avoid a right. And in *Cro. Car.* 264. a tender of amends is pleadable to an involuntary trespass, after the *teste*, and before the arrest, though the statute says, before the action is brought. There are two facts before the arrest; first, the award of the court, which must be in term time. Secondly, The seal of the officer, which may be taken out at any time.

Ch. Just. I shall at present give no opinion; but I believe that this is the first attempt to set up such an averment against an original writ. If it might have been done, it is surprising that it never was done. And as at present advised, I think I should well consider, before I give my opinion, that such writ may be averred against. There is a difference

between the award of the court, and the taking the writ out. But this bill of *Middlesex*, which is only a copy of the award of the court, must necessarily be taken to be in term time. And it never passes under the seal of the court; and that must be taken to be the commencement of the suit. And in *C. B.* a capias is generally taken out before the original; and yet there is no averring against it.

*Page*, Just. I am of the same opinion.

*Probyn*, Just. The commencement of the action is the taking out of the process, and that is the suing out of the writ, so that the words are synonymous.

[84] *Lee*, Just. I think this is too general a rule, to say there is no averring against the record; for the contrary appears by *Noy* 161. I think the words *commenced*, and *sued*, are synonymous terms, and relate to the first part of the action; that is, the award of the court; and the statute of limitations must be taken to be subject to the rules of the courts; and the rules are, that everything done in vacation time, is considered as done of the precedent term. So was *Parsons* and *Gill*, *Mich.* 13 *Will. Ld. Raym.* 695, where it was held that a judgment signed in the vacation, must be considered as a judgment of the precedent term.

*Cur. Propter difficultatem advisare vult.*

*N.B.* The court never gave any judgment in this case; though it stood in the paper for that purpose. The parties agreed it, as Mr. serjeant *Draper* informed the court, when they were going to deliver their opinion.

*Rex v. Lloyd. Sess. Ca. 233. 2 Barnard.*  
466. S. C.

Justices at the quarter sessions, remove the clerk of the peace for misbehaviour; and this was adjudged to be no conviction but an order, and therefore it was not necessary to set out the evidence.

THIS case was first argued in Trin. Term 6 and 7 *Geo. 2.* the defendant being clerk of the peace for the sessions held at *Cardigan*, was convicted by the justices at the sessions of being guilty of extorting several sums of money at several different times, under colour of his office. And the conviction (following the words of the stat. 1 *W. and M. c. 21. f. 6 and 7.*) sets forth, that these offences, as they were set forth in several articles, clearly and plainly appeared to them on due proof made.

*Mr. Fazakerly* moved to quash this conviction; because the justices had not set forth their evidence on the conviction, so that it might appear to this court, whether they had convicted him on due and proper proof or not: In common convictions the evidence must be set forth, because 'tis the only means by which this court can judge of the legality of the proceedings of inferior jurisdictions. This conviction is of the same effect, and extremely penal; for by stat. 1 *W. and M. c. 21. f. 6. and 7.* He is for these offences, to be turned out of his freehold by the justices.

*Mr. Draper, contra.* This conviction is at a quarter sessions, which is a superior court of record, and they never set forth their proceedings. The stat. 1 *W. and M.* does not say the examination and proof shall be taken in writing; but says the examination shall be in open court; and that is done *viva voce*. Must the justices take down and record every word which is given in evidence? And the rules of courts are not to be altered. This is not like a con-

viction in the case of common informers ; for no one here has a penalty. *Rex* and *Horwell, Mich.* 11  
[85] *Anne*, (cited in *Strang.* 998.) No such exception was taken to that case, and yet it was much argued.

Mr. *Fawakerly* replied ; 'tis objected that convictions on penal stat. differ from this, because of the penalty. That can't be the reason of their setting forth the evidence in that case ; but the reason is, because the offence is penal, and therefore it is done in favour of the defendant. 'Tis said too, that it is, because in them cases the convictions are before justices out of sessions ; but tho' it is done by the sessions, yet it must be done by justices of peace. The sessions is a court by act of parliament ; and the justices make a sessions. A conviction before 20 justices out of sessions, would be the same as two only ; therefore their number makes no alteration. 'Tis said no stat. orders the examinations to be in writing ; neither do they in the other cases of two justices, therefore that argument proves too much. *Rex* and *Baines*, Lord *Raym.* 1199.

*Ch. Jusf.* 'Tis certain, that in summary convictions, the justices of the peace must set forth the substance of the proofs, for default of which, several cases were quashed. So the question is, whether *this* case can be materially distinguished from those cases. 'Tis said this power is to be exercised in a court, and therefore there is no occasion for such strictness. But I think this objection scarce sufficient ; for the proceedings against the defendant is not left to the ordinary course of proceedings in sessions ; for then it would be tried by a jury, according to the ordinary rules of law ; but this is a proceeding against him, by way of summary conviction, tho' in the sessions, which differs it only in



the number of justices: and two may hold a sessions. 'Tis said there is no penalty to an informer, and that that is the reason of the distinction, which cannot be; for tho' convictions have set forth the names of the witnesses; yet they have been held to be ill, for want of setting forth the proofs; but the reason is, because whenever justices of the peace proceed in a summary way, they must satisfy this court, that they have gone on legal evidence; which, if they have, cannot be controlled by this court. This conviction only says, that it clearly and plainly appears to them, on due proof; and tho' this method doth pursue the words of the stat. yet they ought to shew that the proof was on oath, and what it was: but here they have taken on them to determine what is the law, and the fact. 'Tis said that great difficulty will attend the justices setting out the evidence; but I think such method will not make a larger record than the present one. For here they have set forth the articles on which they proceeded, very particularly. But suppose instead of it, they had said such witnesses had deposed so and so, and then set forth the material parts of it; I cant think it would be longer than this way.

*Lee Just.* I desire that on the next argument [86] you'll consider whether the evidence is ever set out in orders; for tho' you call this a conviction, yet 'tis a sort of an order, as in appeals to justices, relating to the excise. If an order sets forth that it is made upon examination and due proof, that is sufficient; and the reason is, because there is an appeal to the sessions; and in cases of orders, it has been held not necessary even to set out that the party is summoned.

*Cur.* Let it stand over.

This case coming on again this term, Mr. *Denison*

for the defendant argued thus. When justices of peace make orders out of sessions upon provincial laws, provided the matter appears within their jurisdiction, this court will not presume they have done wrong; unless the contrary appears. But where they act out of sessions, upon penal laws, this court expects they should set forth their power, and the evidence of the conviction, because of the penalty which attends them; and likewise because they are convicted in a summary way, without a jury. *Rex and Parker*, Trin. 6 Geo. 1. A conviction for not curing of pill-chards was quashed, because it was said generally that they found the man guilty of the premises; for it was said that that was making themselves judges of the fact, and the law too. And there is no essential difference between such conviction made in, and out of session. But it is said that this is an order of justices made at their quarter sessions, which is a judgment of a court of record; and therefore they have no occasion to record the evidence, but only the facts, on which they found their judgment. But this is rather a conviction than an order; for it is attended with the penalty of his being deprived of his freehold. Superior courts sometimes give judgment on the evidence; and then the substance of the proof is always set out, as in dower, appeal, &c. as appears in 9 Co. 30 b. Co. Lit. 6. 1 Anderf. 20. Raft. Entr. 228. Doct. pl. 148. And the reason is, because there is no trial by jury; and it is like demurrer to the evidence, where the proofs are set out upon record. Co. Entr. 462. *Queen and Baynes*, Salk. 680. The conviction was quashed, for the deficiency of the charge. I allow, I know of no case which comes up to this; because this was a conviction at the sessions; but I know of no difference in reason, be-

tween a conviction in or out of sessions; and this is an original proceeding.

*Mr. Strange, contra.* The stat. 1 *W. and M. c. 21.* requires three things; first, that the clerk should be guilty of a misdemeanor. 2dly, That complaint of it should be made in writing. 3dly, That the examination should be made in open sessions; and that due proof should be made of it. And here appears to have been all three of them. 'Tis objected that this is a summary conviction, and therefore that the evidence should be set out. I admit that in summary convictions, before private justices, the evidence should be set out, because it may appear that the informer was not a witness. But this is an order; for it is in English, whereas convictions must be in Latin, or they are quashable. The cases cited, which were of the same nature with this, were all in English; and yet such exceptions were never taken to them. This is no more a conviction, than an order of bastardy; and in that case, there is no occasion, either to set forth the summons or the evidence; and yet that case is attended with infamy and punishment. In orders of removal 'tis said generally that the party came to settle contrary to law; and yet such order is held good, because this court will suppose, in the case of orders, that the justices do right. So in the case of an adjudication of settlement, if the order says, the party was last legally settled, at such a place, the court will presume the justices do right, unless they set forth their evidence specially, which they are not obliged to do. So in the case of orders for husbandry-wages; if the order be general, it will be taken to be for husbandry. An appointment of collector of births and burials for a year under 6 and 7 *Will. and M. c. 6. s. 11.* was held well, tho' not said he was appointed for [87]

a year, because by the stat. he could not be appointed for a longer time. In the case of *Rex and Ford*, *Trin. 9 Geo. 1.* [*Stran. 555.*] which was a conviction for keeping an ale-house on the stat. 3 *Car. 1. c. 3.* and tho' it was not said in it, that the party had not been punished before by stat. 5 and 6 *Edw. 6. c. 25.* yet it was held good. For the court said, *that* should be shown by the other side, if it had been so, for that they would not presume it. *Rex and Theed. Mich. 11 Geo. 1.* [*Stran. 608. Lord Raym. 1375.*] Conviction for obstructing an excise officer, in the exercise of his duty, held well, tho' not said that it was in the day time. Convictions on the game act have been held ill, where the witnesses have sworn, that the party was not qualified; because the witnesses ought not to take upon them, to determine the law. But if it appears that they are the words of the justice himself, it is sufficient. *Rex and Marriott, [Stran. 66.]* And these I have cited are the cases of private orders, and convictions. But our case is much stronger; for it is the act of the sessions, which never sets forth the evidence. And here the person himself who was accused, was the proper officer to take it down, if any, for he remained clerk of the peace, till the conviction; and therefore 'tis hard to suppose we could do it in this case. But the stat. requires the proof to be given openly in court, which must be done *viva voce*; and that the rather because the charge is ordered to be in writing; and if so, then it appears this act has been complied with. And this court always pays regard to the rules of superior courts. And the other side can't cite one case, where on such conviction, the evidence was ever set out. There have been three of these orders since the stat. *viz. Queen and Baynes, Rex and Horwell,*

and *Rex* and *Harland*, which have been argued solemnly; and yet this exception has never been taken to them. And the last case would have been confirmed, if Mr. Justice *Eyre* had not taken an exception to the number of justices to the caption; for which it was quashed. Therefore if this originally ought to have been as now contended; yet *communis consensus tollit errorem*, as in the writ of *significavit*, which always contains nonsense, yet the objection to it has been over-ruled. 'Tis objected this is the case of a freehold, where there is no jury. But if the sessions had tried him by a jury, they would have been judges of the evidence proper to be laid before the jury. And in the case of bastardy, a summons is intended, because the matter is left to the discretion of the justices. As to the case of dower, there is no case, where it is adjudged, that the evidence ought to be set out: and to be sure, if they have a mind to set it out, it will not make it bad. The evidence must be set out, on a demurrer to it; because judgment must be given on it. Therefore upon the whole, we hope the conviction is good. [88]

*Ch. Just.* Upon the first argument I thought that the evidence ought to have been set out; because the difference between orders and convictions seems to me to be very slight; and this, if an order, is attended with the same consequence, as a conviction. But now there are two things which stagger me in my opinion; the first is the case of orders and bastardy, where it is required never to set forth the evidence; whether it be made by the justices, in or out of sessions. And yet in that order, there is an adjudication, upon which a punishment is attendant, as well as upon this. The second thing is the case of *Queen* and *Baynes*, where, tho' the order was quashed at

last, on great argument, yet this exception was never taken. And that case was argued by all the judges *seriatim*, as well as by the counsel. And one would think such sagacious men as were then concerned in it, would have found out the exception, if it had been a good one. Therefore whatsoever my own private thoughts are, if I find that the precedents are against them, I must be governed by them.

*Lee*, Just. This exception was taken in the case of *Rex* and *Horwell*, but no judgment was given on it. In the case of *Rex* and *Blackwell*, the words were, *upon examination of the cause and circumstances*; and held it was sufficient to comply with the act. *Rex* and *Venables*, *Trin. 11 Geo. 1.* [*Stran.* 630. *Lord Raym.* 1405.] was an order to suppress an ale-house, upon criminal facts; and on great debate and consideration, the court held that such order was good, tho' it did not set forth that the party had been summoned. Notwithstanding it was held if the justice in fact had not summoned the party, he was punishable for it.

*Cur. Advisare vult*, but seemed very inclinable to confirm it.

*For the remainder of this case, see post.*

**Smith v. Dr. Bouchier & al. *Stran.* 993.  
S. C.**

- [89] **T**HIS case was *first* argued in *Mich. 7 Geo. 2.* An action of trespass, assault and false imprisonment was brought by the plaintiff. Defendants plead not guilty, as to the trespass; and as to the rest justify by virtue of an act made in the reign of *Eliz. an. 13. c. 29* confirming the customs of the university of
- False imprisonment lies against a judge & officer for arresting by process, of which the court had not jurisdiction; but if

the officer does not join with the judge in his defence, it may alter the case as to him.

*Oxford*, and the charter of 14 *Hen. 8.* enlarging and confirming their privileges; and that the charter was confirmed by the said stat. of *Eliz.* then sets forth the customs of that university, relating to arrests, and under that power justifies imprisoning the plaintiff in *Oxford*. The plaintiff replied that no affidavit was filed, of the truth of the debt, pursuant to the acts 12 *Geo. 1. c. 29.* and 5 *Geo. 2. c. 27.* which ought to be made before any arrest. There was a demurrer and joinder in demurrer. This case was argued by serjeant *Chapple* for the defendants, and serjeant *Hawkins* for the plaintiff. The plea was very long, and the exceptions to it very numerous; but as it will more clearly appear what exceptions were deemed material by the court by setting down their answers, I shall pass over the long arguments, which were made by the serjeants, and begin with the answer of the Ch. Justice.

*Ch. Just.* If this plea be bad, it signifies nothing what the replication is. The replication is only that an affidavit of the truth of the debt, was not filed before the process issued, pursuant to the stat. 12 *Geo. 1.* Sometimes acts in the affirmative, tho' general, yet they shall not repeal particular customs, as in the case of *Magna Charta* with respect to court leets. But here are negative words in this act, and such words repeal all particular customs, and courts held by them. But suppose this act extends to the university of *Oxford*, what will be the consequence of it. Can it be supposed in this case that it subjects the judge, parties and officers to an action of false imprisonment? But the act is only directory, and does not make the process void, whether it be in a superior or an inferior court, but subjects the party arresting without such an affidavit, to an action; for the act being a

prohibition, tho' it gives no penalty ; yet if the injury arising from the non-observance of it, be public, an indictment will lie ; if private, an action : so the replication seems out of the case.

[90] Then as to the plea, several objections have been taken to the customs set forth ; and several to the manner, which the defendants have taken to bring themselves within these customs. As to the customs themselves, I doubt if the act of parliament does not support them, that some of them will be void. This is a cautious question, concerning the power of the chancellors in both the universities. It is objected that there is a custom to award a *capias* in debt, without a summons. It is true this is contrary to the general rule of the law ; but in *London*, by the custom there, a serjeant at mace, before any plaint or warrant made, may, by parol, arrest and hold the man in prison, and it is daily practised, and there is no affidavit nor summons ; and yet it is held a good custom. 9 Co. 61 b. *Mackally's case*, so that though this custom be against the general rule of law, yet it does not appear to me for that reason to be bad. Though a confirmation of a bad custom, is a bad confirmation, yet acts of parliament have confirmed several customs, which in law would not otherwise have been good. And if we should not allow the same privilege to the universities, their customs would be void ; for they proceed partly by the civil, and partly by the common, law. This is an action of false imprisonment against the judge, and all the officers concerned in the execution ; and therefore it would be very hard, I think, to subject them all to this action, in case they have not perfectly brought themselves within the custom. There does, indeed, seem to be some irregularity in their manner of doing it, particularly in the



case of the plaintiff's making oath of his debt, for it should have been particularly set forth that the party swore to his debt, and not *de premissis*, as it is in the plea. But the question is, how far this will affect the defendants. In *Lutw.* title *false imprisonment*, it was held, that though the cause of action did arise out of the jurisdiction of the court, yet that the judge, party, and officer, might justify in an action of trespass and false imprisonment; and the reason there given is, because it would be dangerous to subject them to those niceties. As to the officer, says *Powell*, Just. he is the person who immediately commits the trespass, therefore it would be absurd that he should be excused, and the judge not. And he puts this very case of a *capias* in debt, before a summons. Therefore, suppose here the custom be not strictly pursued, if when the cause of action did arise out of the jurisdiction, the judge, &c. might justify a false imprisonment, which is a stronger case than this: I think they may well do it in this case.

*Page*, Just. If an act of parliament confirms customs, it is the same thing as if it had enacted those customs: and it must be allowed that an act of parliament may alter any old way of proceeding, and enact a new one. I do think the making oath of the debt is so closely pleaded, that no perjury could be assigned on it: and I think there is no doubt of the law laid down in *Lutwych*, 937 because the judge, &c. may not be conscious of their precincts.

*Probyn*, Just. Customs are supposed to be contrary to the common law rules, though they are the laws of the place where they are; and if they are not in their nature, contrary to common right, as these are not, they may be good; and an act of parliament has confirmed these of the university: it is not set

[91] forth in the plea, that the plaintiff in the action below, did positively make oath of the debt due to him from the present plaintiff, but it is said he made oath of the truth of the premises; which seems too uncertain. The act of the 12 Geo. 1. says, no person shall be arrested without oath first made of the truth of the debt; but, however, if, after an arrest be made upon an insufficient, or no affidavit, application be made to this court, the arrest is always here held to be good, and the party is held to common bail; and so the arrest is turned into the nature of a summons; and therefore I think it cannot subject the judge, &c. to an action of false imprisonment.

*Lee, Just.* I thought the replication bad, and that their customs seemed to be reasonable, but doubted whether the defendants had sufficiently brought themselves within the custom. As to the issuing the *capias* without a summons, I do not think that custom reasonable: for it can have no effect, unless the plaintiff first makes oath that the party hides himself, and cannot easily be found. But as the defendants have pleaded their case, I do not know whether they are not as much liable to this action, as if there had been no such custom. For, if on process of appeal from *C. B.* the party be taken up, an action of false imprisonment lies for him.

*Ch. Just.* As to the case mentioned by my brother *Lee*, that, if the Common Pleas should proceed on an appeal, they would be liable to an action of false imprisonment. The reason of that is plain, for that it appears plainly, they have no jurisdiction over the nature of that offence; but the judge, in this case, has a jurisdiction over the cause.

*Cur.* Let it stand over.

This case was now [*Trin. 7 and 8 Geo. 2.*] argued

again by Serj. *Skinner*, for the defendants, and Mr. *Strange*, for the plaintiff, and a great many exceptions were taken by Mr. *Strange*, both to the customs of the university of *Oxford*, and the method which they had taken, by their plea, to bring themselves within the custom. It was held by the court, that their customs seemed warrantable enough, but that the defendants had not well brought themselves within them in two instances, which were held to be the only material ones. The First was, That the custom of *Oxford* is, that if the party makes oath, that he believes the party is going to run away, that then a warrant is granted him to arrest him. And the defendants in their plea say, that the plaintiff in the present case, made oath, that he suspected the present plaintiff was going to run away; and thereupon he had a warrant, and arrested him. Secondly, Because it is said that the plaintiff made oath only *of and upon the truth of the premisses*, which he might do, though he swore they were false: whereas he should have sworn that the premisses were true. And for this he cited *Queen and Green, Hil. 12 Ann. 10 Mod. 212*, where, on a conviction for bread, the oath *de veritate præmissorum*, was held ill. *Queen and Grey, Pasch. 13 Ann. Gilbert's ca. Ed. 1760, p. 244. Præstitit sacramentum de veritate materialium in informatione præcedente content.* was held ill. So the justification being held ill, the question was, how far the judge in this case was liable to an action: for it was held, that as the beadle and gaoler had joined in their plea, with the judge, they must stand, or fall, by his case, as appears by 2 *Lutw.* 935, and *Philips and Biron. & al. Hil. 8 Geo. 1.* [*Stran.* 509.] which was a trespass and justification under a judgment, which was afterwards set aside for irregu-

larity. And though the plaintiff, in that case, could not justify, whereas the officers might; yet as they joined in the plea of justification, their justification was held ill; for a plea which is bad in part, is bad in the whole; for it is not divisible, as appears by 1 *Saund.* 28.

Ch. Just. This case is certainly distinguishable from the case of *Gwinne and Pool*, in 2 *Lutw.* 935. For there the judge might not strictly know the limits of his jurisdiction; but in this case the judge must necessarily know his jurisdiction; for by the custom, there were facts antecedent to his power to be done, which appears were not done, as that custom warranted.

*Page*, Just. The case now before us, is, as if there had been no custom at all. I think an action ought not to lye against a judge for taking cognizance of cases arising out of his jurisdiction, unless it appears he was privy to it, and knowing of it; for otherwise no one would act as a judge. But the officer knows nothing of it, and cannot enquire how he came to have the writ; for the sheriff is not obliged to see whether the proceedings are regular or not; for the command of the court is sufficient for him. But the officers here joining in the plea with the judge, hinders them from distinguishing their case.

*Lee*, Just. This is trespass, &c. against the party, judge and officers. And, I think, on the authority of the cases cited, that though their cases may be different, yet, as they have joined, they must all stand and fall together on this record. It appears the defendants have set forth a custom, to enable them to arrest and hold the party to bail; which, I think, for the reasons given, is illegally set forth. So the principal doubt is, whether this action will lie

against the judge, or not. The power to arrest here depends on the custom, which he has not followed: and this he has done knowingly, for he had the custom under his eye, and was the only thing which gave him authority to do it. And the party is in the same condition. And the case in *Hob. 63.* extends to this case; for here the custom not being pursued, all is void; and therefore the judge is a trespasser, *ab initio*.

*Cur.* ordered it to be spoken to again only on this point, in case any thing new should be offered. And they said they would consider the case of *Gwinne and Pool*.

*For the remainder of this case, see table of the names of the cases.*

## MICHAELMAS TERM [93]

### 8 GEORGE II. IN B. R.

#### *Dominus Rex v. Hallingby and others.*

Information granted against 12 persons for demanding money of a person, for a cottage standing on a waste, which had been built there above 20 years, and for threatening to pull the cottage down.

**A**FTER a rule given to shew cause and argument, an information was granted against the defendant, and eleven other persons, tenants of the manor of *Rust-Hall*, in *Kent*, for coming to the house of another tenant of the same manor, and threatening to pull it down about his ears, if he did not give them money for the continuance of it; alleging, for their justification in so doing, that the house was built upon part of the manor, without licence; and that therefore they had a right to pull it down. But

the chief justice said, he would have it to be observed, that he was for granting the information, merely because it appeared that the house had been built for twenty years, which was a length of time sufficient to support a title in ejectment; and that it had continued there ever since that time, without any interruption; which was a tacit admission of its being lawfully built there: and likewise, because it appeared that these twelve men were but part of the tenants of the manor, and therefore their demand for money must be unlawful; because twelve men more might have come the next day, and demanded more money of him on the same pretence; and so the man might be grievously oppressed. And the other justices agreed with him; and all of them likewise agreed, that any person might abate a public nuisance; and that any person might do the same with any nuisance erected on his own land; for that method is sometimes the only one which a person has to redress himself for the injury done him.

[94]

Elliston v. Norton.

**D**EBT on bond; after *oyer* of the condition had, Mr. — moved, that the defendant might likewise have *oyer* of a deed poll, recited in the condition. But the court said, that they could not grant *oyer* of any thing, which the plaintiff is not obliged to declare on, with a *proferit in curiam*; and that if the plaintiff had declared on any deed, without a *proferit in curiam*, where it is necessary, that the defendant might demur to it.

*Oyer* refused of a deed mentioned in the condition of a bond; because there was no *proferit* of this deed in the declaration.

*Rex v. Mayor.*

Indictment for  
selling goats  
hair for human,  
quashed, for not  
setting out a  
venue.

ON the motion of Mr. *Marsh*, the court arrested judgment, on an indictment against the defendant, for selling goats hair for human hair, by deceitful arts, colours, and pretences; because there was no venue laid; for, on consideration of the statutes of *jeofails*, they held that none aided this defect.

*Rex v. Roberts.*

Information  
granted for a  
libel, charging  
the defendant  
with making  
false entries in  
the sessions  
books.

THE court granted an information against the defendant, for publishing a libel against Mr. *Bromley*, which was printed in the *Whitehall Evening Post*; where it was said, that Mr. *Bromley* had made false and fictitious entries in the records of the sessions; and had conveyed away the public books of the sessions, *sedente curia*. The evidence of Mrs. *Roberts*, her publication of this paper was, that a person went into her shop, and bought this paper of a woman, who (as he swore) he believed was Mrs. *Roberts's* servant. But he did not set forth in his affidavit, what grounds of information he had for so believing; and therefore this was said by her counsel to be insufficient evidence to ground the information on. But the court said, that this evidence was sufficient; and that such has been always allowed. It was likewise objected, that in this case Mr. *Bromley* had his remedy by action; and therefore no information ought to go. But *per Curiam*, that is no reason at all. For informations are granted in many cases, where the party might likewise have his action; as in the case of an enormous battery, and such like.

Then it was said, that this was depriving her of the benefit of justifying, which she was intitled to in an action for a libel; and that it was, in a manner, fore-judging her, and concluding her from saying it was no libel. But the Ch. Just. said, that he thought, in an action on the case, for a libel, no strict justification could be pleaded; tho' it might be given in evidence, in mitigation of damages; and that so it might be here, in mitigation of the fine. And the other justices did not deny it, but all seemed to allow of the distinction: which was then, and has oftentimes been taken, that you may justify for words *spoken*, but not for words put into writing. For that the first may be supposed to be the effect of heat and passion, and to have but a short continuance: whereas the latter must be done with deliberate malice; and may be probably supposed to spread the scandal, and to perpetuate it. And that is the reason why, in many cases, matters of reflection put into writing, have been held to be libellous; when the very same words, if *spoken* only, would not have supported an action. And to the other part of the objection, the court said, that their granting this information did not any more estop her from saying it was not a libel, than she would be in the case of an indictment, or an action; for that she may demur to it, or move in arrest of judgment.

### Rex v. Charitable Corporation.

**M**R. *Burroughs* was one of the committee of the *Charitable Corporation*; and the rest of the society having brought a bill against him, and some others of the members, for a discovery and account,

*Mandamus* denied to restore a man to his right, to vote as a member of the *Charitable Corporation*.



there was a meeting to determine whether they should continue to prosecute it or not; and he being denied to vote in this question, moved for a *mandamus*, to be restored to his right of voting: and on rule given to shew cause, Mr. *Strange* and Mr. *Denison*, cited for the plaintiff *Burroughs*, the following cases, *Rex* and *Company of Combmakers*, *Mich. 1 Geo. 1.* which was a *mandamus* to restore a man to the liberty of binding out his apprentice; *Rex* and *Bailey*, *Mich. 10 Geo. 1.* *Mandamus* granted to settle the accounts of the expeditors of the *Commissioners of Sewers*. 1 *Lev. 119.* A *mandamus* to restore a man to his priority and precedency, of place of alderman. *Rex. v. Dean and Chapter of Dublin*, *Mich. 9. Geo. 1.* [*Stran. 536.*] *Mandamus* to restore an archdeacon to his voice in the chapter, and his stall in the choir. The court thought that the cases cited might be right enough; but that the case at bar did not come up to them; for that it appeared that this corporation had a power by their charter to make by-laws; that all corporations may, by virtue of such charter, make by-laws to restrain some of their members from the exercise of a particular part of their power, as is often done in the case of electing officers; and that by this resolution or law of theirs, Mr. *Burroughs* was not entirely excluded from the liberty of voting, but only in cases where he was concerned in interest, and might be thought to be too partial; which seemed to be a very reasonable law; and therefore they discharged the rule.

[96]

Filks v. Newman.

**E**RROR on a judgment in *C. B.* in an action of the case. Mr. Gapper objected, that the *possea* does not set forth the names of the jurors; but says only, that the jurors being elected and sworn, &c. But the court held that it is not necessary to be done where no *tales* is prayed; for that it is done in that case, to distinguish who appeared on the principal panel, and who on the *tales*; and that this differs not from the case of trials at bar where the jurors names are never set out: and thereupon affirmed the judgment.

Where no *tales* is prayed, it is not necessary to indorse the names of the jurors on the *possea*.

Rex v. Harrison.

**A**FTER rule given to shew cause and argument, the court granted an information against the defendant, for suing a writ of *capias* out of *C. B.* and going before a judge of that court, to oppose the person's discharge on common bail, who was taken up by that *capias*, he then being under-sheriff of the county of *Essex*; whereas the statute 1 *Hen. 5. c. 4.* says, that no under-sheriff, during his office, shall be an attorney in any of the king's courts: and this was compared to the case of *Rex v. Hurst. Mich. 7 Geo. 2.* which was now cited and allowed by the court, in the absence of the Ch. Just.

Information granted against an under sheriff for acting as an attorney.

Rex v. Parnam.

**T**HE defendant was brought up here by *babeas corpus* from the house of correction, being committed there, for receiving a silver spoon, which was stolen, knowing it to be stolen; and Mr. *Eyres* moved

Court refused to bail a person for receiving stolen goods; defendant's ass-

davit admits the receipt of the goods, but denies he knew them to be stolen, which is a fact triable only by a jury.

that he might be bailed, having four creditable and substantial men for that purpose; and having an affidavit to produce, which positively swore, that though he did receive the silver spoon, yet that he did not know that it was stolen; and that the prisoner was an apprentice to an apothecary of this city, and the son of a gentleman of fortune. And cited the case of *Rex and Crips*, *Pasch. 6. Geo. 1.* to shew that the court will sometimes enter into the probability of the person's not being guilty (of the matter of which he is accused) and will read affidavits to that purpose.

The court, at first, scrupled to suffer the affidavits to be read; but on citing *Crips's* case, they permitted it. And then Mr. Just. *Lee* said, that the prisoner had admitted the reception of the spoon, though he denies that he knew it was stolen: so that the only question is, whether he did know it or not; which is a matter fit to be tried by none but a jury: and that [97] the reason why they admitted *Crips* to bail was, because the prosecutor himself confessed himself doubtful as to the identity of the person. But that is not the case here; and in *Crips's* case, I denied, on the trial, to grant him a copy of his indictment, in order to bring an action on it for a malicious prosecution; because the accusation seemed to be grounded merely on the mistake of the identity of the person.

Ch. Just. According to my brother *Lee's* state of the case of *Rex and Crips*, it appears that he was not bailed, on consideration of the merits of the commitment, but of the mistake of the person accused. But here you apply to have the defendant discharged on the very merits: but I think it would be of the most dangerous consequence, if we should allow of such proceedings; for then all the prisoners in *England* would lay their case before us, and we, instead

of the jury, must try the truth of the fact for which they are committed. Beside, it might very much encourage the compounding of felonies, between the prosecutor and prisoner. And therefore I think he ought to be remanded: and *per Curiam* he was remanded, *absente Probyn*.

Crutchfield v. Lockman.

THE defendant being retained as secretary to monsieur de Thome, envoy to the duke of Sax-Gotha, was arrested in an action, to which he gave bail, and afterwards he moved to set aside the proceedings in this action; and that the bail bond, which was given for his appearance, might be delivered up to be cancelled; he being, by his employ, privileged from arrests, by virtue of the statute 7 *Ann.* and a rule was given to shew cause; and on shewing cause, the plaintiff's counsel produced affidavits, which swore positively, that he was a trader in merchandize; and mentioned particularly his trading in diamonds, and selling great quantities of them; which must, of course, exclude him from his privilege; all merchants and traders whatsoever, within the description of any of the statutes against bankrupts, being excluded by an express proviso in the act. But the defendant had likewise an affidavit, to shew how he came to sell these diamonds, and to inform the court that he never bought any for sale; but only sold some diamonds which came to him by marriage. It was much debated, whether this affidavit ought to be read now, on shewing cause; or whether they ought not to allow it. And, at last, the Ch. Justice said, that he was of opinion, it ought not now to be read;

Stat. 7 *Ann.*  
c. 12, concerning ambassadors and their servants being protected from arrests, extends not to any servant who is a merchant, or trader; and the affidavit on which the defendant moves, should shew that he is no trader.

for that it ought to have been produced on the original motion. For the statute 7 *Ann.* he said, is a general statute, and exempts all traders from the privilege now claimed by the defendant; and that he ought to have taken notice of it; and therefore, when he moved for his privilege, he should have had a general affidavit that he was not a trader. He said likewise, that he thought it ought to be established as a general rule, that no affidavit should be read by the party who opposes the shewing cause; because the other party has no opportunity to controvert such affidavit; for that would be making proceedings endless; and that it the rather ought to be observed in this case; for that this is not final on the defendant; seeing he may still plead his privilege. And tho' he thought that the above rule ought to be established, yet he thought that, wherever it appeared to the court to be doubtful, on the case set forth by the plaintiff in shewing cause, such affidavit as explains the fact more fully, may be ordered to be read, to inform the consciences of the court; and for that reason only. And he compared it to the case where the court orders a second *certiorari*, to inform their consciences on a writ of error, tho' the defendant in error himself, has lapsed the time of praying it. And therefore, *per Curiam*, the rule to shew cause was discharged. [98]

Rex v. the Mayor and Aldermen of  
*King's-Lynn.*

**M**ANDAMUS had been sent to the defendants to restore Mr. *Allen* to the office of a common council-man of that borough; to which they made a return, which was very long; and to which Mr. *Fowlkes* now took several exceptions. But the only one which the court thought material was, that he was not summoned or heard, before he was turned out of his office; which is contrary to the resolution in *Bagg's case*, 11 Co. 99a. 1 Roll. Rept. 224. S. C. 1 Sid. 14. 2 Sid. 97. and 4 Mod. 33.

Peremptory mandamus granted to a common council-man, for not setting out in the return that the party was summoned.

Mr. *Draper contra.* Said, that they had returned that he kept himself concealed and armed with pistols, so that no one could find him, or come near him, to summon him.

But *per Ch. Just.* That is not sufficient; for it appears that he lodged within the borough of *King's-Lynn*, at the time of his removal, tho' he kept himself private; and tho' they have said in the return, that they could not summon him, yet that is not enough; for that is only their collection and inference. But they should have returned that they had endeavoured what they could to summon him, and could not do it; and such proceeding might be an excuse for not having summoned him. But here does not appear to be any such thing done; and therefore I think the return is bad.

And *per Cur.* The return was quashed, and a peremptory mandamus was granted.

Rex v. Justices of the Peace of the Bo- [99]  
 rough of *Warwick*. *Stran.* 991.

S. C.

SEVERAL *certioraries* had been granted to remove eight orders made within that borough. And motion was made, and rule given to supersede them, *quia improvidè emanaverunt*. And on shewing cause, there was a long debate, and at last the court ordered that the *certiorari's* should stand for six of them; but that the *certiorari's* which were to remove two orders of appointments of overseers of the poor, should be superseded; because it appeared that an appeal was lodged from these orders to the sessions, which was still depending and undetermined.

For, *per Ch. Just.* If no appeal had been brought in this case, a *certiorari* might have issued immediately; and this is not contrary to the rule laid down in *Salk.* 147. for in this case no time is limited by the stat. 43 *Eliz. c. 2.* for the appeal to be commenced; and therefore no one can say whether ever it would be appealed from. By the stat. 43 *Eliz. c. 2.* two sorts of appeals are given; either on the law and fact, to the sessions; or by *certiorari*, to this court, on the law only. And I think, tho' the party has his election to proceed either way; yet when the jurisdiction is once attached, that court which has possession of the cause, ought to keep it, till they have determined it. And in this case, the sessions can try both the fact and the law; whereas this court can enquire only into the law, as it appears on the orders. And this seems to me to be like the case on writ of error from a judgment, given originally in this court;

when, tho' the party has his election to go either into the exchequer chamber, or the house of lords; yet if he once brings his writ of error in the house of lords, he shall never resort back to the exchequer chamber; and so, *vice versa* till the judgment is affirmed or reversed. And *Page* and *Probyn* were of the same opinion.

*Lee*, Just. Allowed that the orders ought not to be taken from the sessions during the continuance of the appeal; but doubted, whether or no these *certiorari's* ought to be superseded; or whether the orders ought not to be returned into court, that they might see whether they ought to be sent down or not, before they are filed; according to the case in *Salk.* 147. (a copy of which he had out of the office it being the only one which could be found of that year) or whether they ought not to follow the method taken in the case cited *Hil.* 8 Geo. 1. by the Ch. Just. which was a *certiorari*, to remove an order of justices, for the removal of a poor person; which was filed. And because it appeared the time of appeal was not expired, it was taken off the file. But the Ch. Just. answered that he still thought the right way in this case, was to supersede these *certiorari's*; for that there cannot be a better reason for superseding such writs [100] *quia improvidē, &c.* than because the appeal is depending; and the rules mentioned are applicable only to cases where the orders are actually moved up hither, and filed or not filed. But that can be no objection to the manner of proceeding on these *certiorari's*, where the orders are not returned, and where the whole case has been laid before the court, as upon motion, before the orders are returned. Upon which *Lee* consented, with the rest of the court, that these two *certiorari's* should be superseded; which was ordered accordingly.



Rex v. Whitfield.

Information denied for affronting words spoken of a constable, tho' in the execution of his office.

IN this case the Ch. Just. said, that abusive and affronting words spoken against a constable, tho' a conservator of the peace, were no grounds for an information; tho' they were actually spoken of him in the execution of his office: but that the constable is not without his remedy, for that he may indict the party for it; or have him bound over to his good behavior.

Hart v. Holmes.

Prohibition on a libel for saying she had a bastard; the words being spoken in London, and the same as calling her a whore.

A PROHIBITION was prayed to stay a suit in the spiritual court for these words, viz. "She the said *Rachel Hart* had a bastard by a chimney-sweeper." On suggestion that the words were spoken in *London*; where, by custom an action lies for them; because a whore is there to suffer the corporal punishment of carting and whipping. And a rule was given to shew cause; which Mr. *Strange* endeavoured to do, by saying that the custom of *London* extended only to the word *whore*, and not to the words which call her so by implication and construction; and for that he cited *Lutw.* 1042. and 2 *Roll. Abr.* 296 Pl. 16. And said likewise, that it did not appear that the words were spoken within *London*. To which the Ch. Just. said, that words which amount to the calling a woman whore, are as much within the custom as the word itself: And mentioned a case (but not the name nor the time) where it was determined that a prohibition should go for calling a man a cuckold, the suit being instituted by the wife; and it being averred that the man had no other wife at

that time. And as to the last exception, he said that they would order a prohibition to go, only to stay the suit, for so many of the words as were spoken within *London*; and so was the rule given *per curiam*.

[101]

*Trivett v. Jefferies & al.*

**D**EBT on bond by plaintiff against the defendants, executors of *Mich. Jefferies*, who was administrator of *Will. Sims*, upon a bond entered into by *Will. Sims*. The defendants pleaded, that *Mich. Jefferies* fully administered all the effects of *Will. Sims*, which came to him in his life time, and that they have not, nor ever had any assets of *Will. Sims* in their hands. The plaintiff replied, that *Mich. Jefferies*, at the time of his death, and that the executors at the time of exhibiting this bill, had goods, and which belonged to the said *Will. Sims*, at the time of his death, to the value of the debt, and verdict was found for the plaintiff in the very words of the replication. And now it was moved, in arrest of this judgment, by serjeant *Belfield* for the defendant, who said, that this action did not lie against the executors of the administrator of the obligor; and that the stat. 30 *Car. 2. c. 7.* would not help them, because that extends only to the charging of executors or administrators of persons, who, as executors or administrators, in their own wrong, shall waste or convert any goods, &c. of any person deceased, to their own use: and that the stat. 4 and 5 *W. and M. c. 24. sect. 12.* was made only to obviate a doubt, whether the executors or administrators of such executors and administrators of right shall be chargeable or not, and to make them so; whereas

Debt lies not against the executors of the obligor's administrator; because there is no privity between the executors and the obligor; but administration *de bonis non*, of the obligor should have been taken out.

here is no *devastavit* alleged in the declaration against the administrators of the obligor.

Mr. *Draper* argued for the plaintiff, and said, that the verdict having found that the executors had assets of the obligor in their hands, this action therefore was maintainable.

*Ch. Just.* This action cannot be maintained at common law, because that requires a representation between the executors of *Mich. Jeffries* and the obligor *Will. Sims*. Nor is there any privity; for there ought to have been taken out administration *de bonis non, &c.* of the obligor by his administrator; and the executor of his administrator is not intitled to such administration, for want of privity. So the question is, whether the statutes 30 Car. 2. c. 7. and 4 and 5 W. and M. c. 24. sect. 12. will support this action; and 'tis plain they will not, for the reasons given by my brother *Belfield*; for here is no *devastavit* alleged to be by the administrator of the obligor; and in case there had, these executors would not have been then chargeable, by virtue of any representation to the obligor, but by force of the above mentioned statutes. And the verdict having found that there are assets of the obligor remaining, makes it so much the worse. For then it appears that administration *de bonis non, &c.* ought to be taken out. Wherefore *per Cur.* (*Page* absent) the judgment was arrested.

[102] *Rex v. Inhabitants of the Borough of Stamford, in the County of Lincoln.*

**M**R. *Abney* moved to quash an appointment of overseers of the poor of the parish of *All-Saints*, within the borough of *Stamford*, made by two justices of the peace; because they had set out in their order, that they were justices of the peace of and for the borough of *Stamford*, within the county of *Lincoln*, (one of whom is of the *quorum*;) but had not said, that they are head officers within the borough of *Stamford*, which is a town corporation; and therefore this case does not fall under the directions of the first clause of the statute 43 *Eliz. c. 2.* where it is directed, that one of the justices who makes an order of appointment, shall be of the *quorum*; because, in that case, such power is given to any of the justices of the peace of the county. But this case falls under the eighth clause of that act, whereby it is enacted that the head officers of such towns corporate, shall make such orders within their townships. And therefore justices for the county at large, merely as such, cannot make such appointments within this town corporate, unless they are head officers of the town likewise.

Appointment of overseers in a corporation must be by the head officers.

But *per Ch. Just.* We cannot go out of the order, or adjudge upon a point, which does not appear upon the face of it. And as it does not appear to us upon the face of the order, that the borough of *Stamford* is a town corporate, we cannot take notice of it; for it does not necessarily follow, because it is a borough-town, that therefore it is a town corporate; for many boroughs are not so. And therefore I think the order is well made, for they have said that they are justices of the peace, of and for the borough of *Stamford*, in

the county of *Lincoln*; one of whom is of the *quorum*; which is a sufficient description within the first clause of the statute 43 *Eliz. c. 2.* and therefore I think the order should be affirmed; and *per Cur.* for the above reason, it was affirmed.

### Rattle v. Popham.

Tenant for life, with power to make a jointure before marriage, makes a lease for 99 years determinable on her life, in trust for his intended wife; held that this was not a good execution of his power.

**T**HIS was a case specially stated for the opinion of this court; and in effect was only thus, *viz.* A tenant for life has a power to make jointure for his wife, during her life; and he by indenture before marriage, makes a lease to trustees in trust for her, for the term of 99 years, determinable on her life. And the question was, whether *A.* in this case had well pursued his power, so as to convey this lease to the wife; or whether this was a void execution of the power, by means of which the person in remainder was intitled to the lands in question.

Serjeant *Hawkins*, for the remainder man, agreed, [103] that the execution of powers ought to be construed strictly; and that there was a great difference in the eye of the law, between a lease for life, (which was a freehold;) and a lease for years, which was only a chattel real. And to shew that this was a bad execution of the power, cited *Whitlock's case*, [8 *Co. 69. b.*] where it is held, that if a man has power to make leases for three lives, he cannot make a lease for ninety-nine years determinable on three lives, for that is not within the power; and that case is the same in effect with this. *Co. Littl. 45.*—*And he was going on to cite more cases*; but the Ch. Just. said he thought these were enough; and therefore desired to know what the counsel of the other side could say

to it. Upon which Mr. *Wilbrabam* said, that he allowed these powers must be construed strictly, because they were a prejudice to the person in remainder; but that this lease is to commence and determine as a lease for life; and that this lease was rather an advantage to him in remainder; for now he has the freehold in him; and such an estate on which he may suffer a recovery; which he could not have had if the power had been pursued literally. Beside, this is a limitation to trustees, in trust for her, which can never be a bar of dower. And it plainly appears this power was executed by the consent of parties.

Serjeant *Hawkins* was going to reply; but the Ch. Just. said, he might save himself the trouble; for that this was a very plain case. And that tho' it might be a hard case, especially this being done before marriage; and so the wife was a purchaser for a valuable consideration, and for that reason possibly she might be relieved in equity; yet that this court could not take notice of it; and that this was expressly within the resolution of *Whitlock's* case. And there is a difference between a particular power affirmative, and a general power, restrained with a negative. And for that reason it was held in *Whitlock's* case, that if one hath a power to make a lease for three lives, or twenty-one years, he cannot make a lease for ninety-nine years, if three shall so long live. But if he has power to make any lease or grant, provided such lease or grant shall not exceed the number of three lives, or twenty-one years, there he may make a lease for ninety-nine years, if three shall so long live; for that doth not exceed the number of three lives; but in truth is less. And it is no answer to say, that this is no prejudice to the remainder.

And this resolution is agreeable to all the resolutions on the statute 32 *Hen. 8.* and therefore I think this power is not well executed. And that was the opinion of the rest of the justices.

*Bern v. Bern, ca. Temp. Hardw. 72. S. C. [104]*

Writ of dower,  
of one *messuage*,  
or *workhouse*, is  
certain enough.

THIS was a writ of error in dower, from the court of *B. R.* in *Ireland*, which was removed there by a writ of error, from the court of *C. B.* where judgment was given for the demandant, and affirmed in *B. R.*

Mr. *Parker* for the tenant, took the following exceptions. First, That the court says, *messuage*, or *workhouse*, and that is bad, for the uncertainty of it; for that as much certainty is required in a count of dower, as in an ejectment; because the sheriff is to give the party seisin of it; and in an ejectment, *messuagium sive tenementum* is ill. Secondly, The *scire facias* to assign errors in *B. R.* in *Ireland*, is made returnable at a day certain; and as this is on proceedings by original, it is a miscontinuance; and being after a verdict, the statute of jeofails will not help it. And this court is obliged to take notice, that the court of *C. B.* in *Ireland*, proceeds by original: and that is the difference which is taken between a writ of error, and an *habeas corpus*. And so is it in effect determined in *Salk. 269*, and no appearance aids it. 1 *Sid. 406.* 1 *Ventr. 7.* Thirdly, Here the tenant appears to be amerced twice, by which he is doubly punished.

Mr. *Strange* argued of the other side, and gave, in effect, such answers as are given by the chief justice.

Ch. Just. The words *messuage*, or *workhouse*, are certain enough; and if it had been *messuagium fructu domum*, it would be well enough. And the reason why in ejectment *messuagium fructu tenementum*, is bad, is because of the large extent of the word *tenementum*. As to the return of the *scire facias*, it is a summons to assign errors; and though it is not originally right, and we are obliged to take notice of the proceedings of *C. B.* in *Ireland*, as well as of *C. B.* in *England*; yet as the plaintiff in error might have come in gratis, and assigned errors, and has not done it, but has come in and appeared on this writ, I think the appearance has made it good: and verdicts have been taken to help discontinuances arising after the verdict. And the error of the double amercements is amendable by the statute 16 and 17 *Car. 2. c. 8.* which says, that such error shall be amended in such courts where the first judgment is given, or where the writ of error is depending. *And the court were of the same opinion; whereupon that mistake was amended instantly in court, and the judgment, per Curiam, was affirmed.*

[105]

*Colcot v. Eastman.*

**W**INNINGTON moved to withdraw a plea of *non assumpsit*, for goods sold and delivered, and to bring fifteen pounds into court, and to have it struck out of the declaration; which the court denied to grant; for they said the constant rule of this court was, that, after a plea pleaded, no money could be brought into court.

After plea, money cannot be brought into court..



*Rex v. Justices of the Peace of  
Somersetshire.*

Vestry cannot apply money in the overseers hands, towards recovering a charity; but the overseers must account for it.

**T**HIS was a return to a *mandamus*, directed to all the justices of the peace of the county of *Somerset*, and to every one of them, to sign a warrant of distress, to levy some money which was in the hands of the preceding overseers of the parish of *Somerton*, within that county. The return to it by the justices, was stated specially, and was thus, *viz.* That before the end of the year, and making up their accounts before two justices of the peace, (upon which account the justices adjudged that thirty pounds was then remaining in the hands of *John Squire* and *Charles Ford*, the last overseers,) the parishioners of the parish of *Somerton* had met in vestry; and there ordered that the surplus money, which was in the hands of *Squire* and *Ford*, their last overseers, should be employed by them to get an attorney to recover some money, which belonged to the parish, from the hands of one of the masters in *Chancery*, which had there lain dead for a long while. And that *Squire* and *Ford* did employ an attorney for that purpose, whose bill came to thirty pounds, which was all the surplus money they had; and therefore the justices say they did not grant a warrant of distress.

Mr. *Gapper* now moved, that this return might be quashed, and that a peremptory *mandamus* must go. For he said, that as this case was specially stated, it appeared plainly, that the vestry had no such power, and that the accounts passed by the two justices, not being appealed from, the order was conclusive. And notwithstanding what was said by Mr. *Draper*, who argued of the other side, the court was of that opinion.

For *per Ch. Just.* The vestry has no power to order, that the surplus money, in the hands of the overseers, shall remain with them, to recover charity money. For the statute 43 *Eliz. c. 2. s. 2.* says, that the overseers shall make up their accounts, before two justices of the peace, of all money by them received; and such sums of money as shall be in their hands, shall pay and deliver over to the overseers newly appointed. Where then is the power of the vestry? and this is not like the case of church rates, which are cognizable only by the *Ecclesiastical Court*. For [106] in that case, if the parish is satisfied, the *Spiritual Court* can have nothing to do with it.

*Lee, Just.* This order of vestry signifies nothing; for the statute 43 *Eliz.* must be complied with, which orders the surplus of the disbursements to be paid over to the succeeding overseers; and here the two justices have adjudged, that there is thirty pounds remaining in the hands of *Squire* and *Ford*, the last overseers; and therefore a peremptory *mandamus* ought to go, to oblige the justices to sign a warrant of distress, to levy the money in their hands; and *per Cur.* a peremptory *mandamus* was granted.

Tryon v. Carter. See this Case stated in  
Page 71. (2nd ed.)

**M**R. *Filmer*, for the plaintiff in error. This is an immaterial issue; for the plaintiff ought to have replied, the money was not paid on the fifth of *December*, or any time before, according to the form and effect of the condition of the bond; and not have relied only on the payment on the fifth of *December*. So is *Cro. Jac.* 202. *Yekert.* 122. S. C. *Holms* and

*Broket. Cro. Jac. 434. Colborne and Stockdale, Hil. 8. Geo. 1. [Stran. 493.]* which was debt on bond for one thousand five hundred and fifty pounds. Defendant pleaded, that one thousand five hundred pounds was for money won at play. The defendant demurred; and it was held to be a good cause of demurrer; for the statute says, that the whole, or any part so won, shall be void and irrecoverable. And this plea of the defendant's, that the money was paid on the fifth of *December*, is not any confession that it was not paid before the fifth of *December*, as appears from *Cro. Eliz. 823.* therefore the replication is bad, and the judgment ought to be reversed.

*Serj. Chapple, contra.* It is said, that this is an immaterial issue, because nothing could have been given in evidence on it, but payment on the precise day of the fifth of *December*. But, on this plea, payment at any time, before the day, might have been given in evidence; for there is a difference, where a particular sum is to be paid on a precise day, and where it is to be paid with interest; for in the first case, it is an immaterial issue to confine the payment to a particular day; but not so in the last case: for in this case nothing was payable at any other day certain; for this was a particular sum to be paid with interest on a particular day; and every other day will so alter the value of the interest money, that the payment of it cannot be pleaded on any other day than the fifth of *December*, but with a computation, and reckoning up of the interest. The case of *Holms and Broket*, is very different from this case; for there payment before the day, would have been payment at the day; and that payment before the day is, in some cases, taken to be payment at the day, appears from 1 *Roll. [107] Abr. 440. Co. Littl. 212. b.* Here the condition of the

bond is to pay the money with interest, on or before the fifth of *December*; and if the defendant had pleaded that he had paid it on or before that time, it would have been wrong. For if the case had been that he had paid it before the fifth of *December*, yet he should have pleaded that he paid it on the day; for the payment before the day, would have been considered as a deposit, and not a payment, until the fifth of *December*; and therefore the replication is good, because it says, that the defendant did not pay it on the fifth of *December*; which was the day the defendant in his plea must rely on, as the time of payment. And where the time is material, it must be traversed; and if payment before the day, be payment at the day, then, as the jury have found, the money was not paid on the day, they have in effect found, that it was not paid before the day; and so, that the money was not at all paid.

Ch. Just. I am not satisfied, that this is a material issue; for it does not appear by this finding of the jury, that here is a breach of the condition of the bond. This condition is not in the common form; for if money be to be paid on a particular day, and issue be taken on the payment on that day, the issue is well enough; and the finding would be good, though it was not paid on that particular day, because it could be a payment but on that day. And yet if the money be paid before the day, it will be considered as a deposit until the day, and a payment on the day; and therefore a complete performance of the condition on the day. But, in this case, the condition of the bond is, to pay the money with interest, on or before the day: so that here might be a strict performance of the condition, by paying the money before the day. And in this case, the payment before the day, would not

have been considered as a deposit until the day ; because, by the words of this condition, there might be payment before the day : and therefore I think that payment on a day, before the fifth of *December*, could not have been given in evidence on this issue ; because the money so paid before the day, would not be a deposit, but a payment. The rule of pleading is, that when debt is brought on a bond, for the performance of an award, and the defendant pleads no award made, the plaintiff must not only reply, that there was an award made, but likewise must shew a breach of the award. And the reason is, because an award may be good for part, and bad for the rest. But this is the only instance of this nature ; for the general rule is, that where there is a collateral matter pleaded, there is no occasion to do more in the replication, than only to meet the defendant's plea, and not go over to assign a breach. But wherever a particular act of performance is pleaded, and not a collateral matter, it is not sufficient for the plaintiff, barely by his replication to meet the defendant's plea ; but he must go on, and assign a breach : and therefore, as the defendant has here pleaded a strict performance, the replication ought, not only to have met the defendant's plea ; but it should likewise have gone on further, and shewn that the money was not paid at all.

[108]

And to support the distinction taken above, there is this case adjudged, *viz.* Debt on bond, defendant prayed *oyer* of the condition, which was for the payment of money, on the twenty-ninth of *September*, and pleaded, that on the nineteenth of *September* (which was before the time mentioned in the condition) he made a conveyance of lands to the plaintiff in lieu and satisfaction of the debt ; which the plaintiff so

accepted. The plaintiff replied, *quod non conviciavit, modo & forma* ; and to this replication the defendant demurred specially, because there was not assigned any breach of the condition ; and for that was then cited, 1 *Saund.* 102. *Pas. 5 Ann. Steel and Manly*, and *Steel and Hill*. But notwithstanding that, the replication was held to be good, because, that this was only a collateral matter pleaded ; therefore it was sufficient for the plaintiff, in his replication, to meet the defendant's plea, without going over to assign a breach. This case was adjudged, *Pas. 9 Ann. Dilden and Stute*.

*Page, Just.* Payment before the day, cannot here be a performance ; because every day creates a particular sum. Here were two times of payment ; and you have only shewn that he did not pay it on one of them, which is not a breach of the condition.

*Lee, Just.* If, in this case, payment before the day, would not amount to payment at the day, your replication might be well ; but here it cannot be so ; for the condition of this bond is to pay principal and interest, on or before the day ; and therefore, if the principal and interest be paid before the day, it is a strict performance of the condition of the bond, on the day in which it is paid ; and therefore the money can never lie as a deposit to answer payment at another day. And here you have precluded the defendant from an advantage which he ought to have, by tying him up to this particular day. And by the case cited by *Mr. Filmer*, it appears, that the defendant pleading he paid it on the fifth of *December*, has not confessed that he did not pay it before.

*Ch. Just.* If the defendant had, in this case, paid the principal and interest, but three days before the

fifth of *December*, he could not have given it in evidence in this issue.

*Cur.* Reversed the judgment given below, and granted a repleader.

*Moor v. Anderson, ca. Temp. Hardw.*

103. S. C.

Debt lies in an inferior court, for the sheriff's fees, due upon an execution issuing out of *C. B.* for this is collateral to the original judgment.

THIS was error on a judgment in *White Chapel Court*, in the manor of *Stepney*, in an action of debt, brought by the bailiff of that liberty, for ninety-nine pounds, poundage money due to him for executing three writs of *fieri facias*, for the defendant, who, by a judgment given in *C. B.* was intitled to this execution against a third person. [109]

*Mr. Kettleby*, for the plaintiff in error, objected, that debt would not lie upon the statute 29 *Eliz. c. 4.* which limits the fees of sheriffs upon executions. Secondly, That this action should have been brought in *C. B.* from whence the process issued; and not in the inferior court. 6 *Co. rep.* 19. *b. Gregory's case*, 11 *Co. rep.* 38. *a. Metcalf's case*. This act is misrecited and ill described; for the statute was made in the twenty-eighth year of *Eliz.* and not the twenty-ninth, as they have set forth, *Salk.* 331. and the plaintiff, in setting forth the act, has omitted the word *execution*; and they have concluded thus: *by which means, and by force of the statute aforesaid*; whereas there is no such statute as they have set out.

*Mr. Stracey*, cited 2 *Mod.* 240. to shew that this being after a verdict, the misrecital of the statute is aided; and the rather, because this act is there held to be a private act; and 2 *Mod.* 98. to shew that the plaintiff had no occasion to recite more of the

statute than will serve his own turn : and if he does that truly, and mistakes the rest, this will not vitiate the declaration. *Dy. 95. Hob. 310.*

Ch. Just. This is an action of debt, for fees for levying money on an execution ; and so this action is collateral to the original judgment ; and therefore this action does lie in the inferior court. But this action is not founded on any express words of the statute, 28 *Eliz.* but in consequence of it. If this is to be taken to be a public act, the misrecital will be fatal : and it seems strange to me, that this statute, which concerns all the people of *England*, should ever be construed to be a private act. But by 2 *Mod.* 240. it appears to have been so determined ; and so indeed has the statute 23 *H. 6. c. 10.* though, if that matter was *res integra*, I believe it would receive another determination. *Plowd. 60. Dive and Maningham.* The defendant here might have pleaded *nullius record*, to this misrecital, or have given it in evidence ; and since the defendant has not done it, I think, as this act is taken to be a private one, we must take it to be as the plaintiff has set it out ; and the jury have found it to be so. And as we are not to take notice of private acts judicially, unless they are pleaded ; I do not see why we are not to take notice in this case, that the statute is different from what the plaintiff has set forth, which is sufficient to entitle him to this action.

*Cur. ordered* it to stand over.

This case was argued again by Serj. *Hawkins*, for the plaintiff in error, and Mr. *Draper*, for the defendant ; but the court gave their opinion only upon one point of the case, and therefore I shall pass over every thing but that.

Ch. Just. I think it impossible to include a writ of *fiery facias*, under the word *extent*, and as the



statute 29 *Elix. c. 4.* is agreed on all hands to be a private act, we can take no farther notice of it, than the plaintiff has set it forth in the declaration. And as he has omitted the word *execution*, which would have comprehended the *feri facias*, we can take no further notice of it. Now the word *extent* is an old term well known; and the manner of its execution differs materially from that of a *feri facias*; for on a *feri facias*, the sheriff is to sell the goods, and to pay the money over to the plaintiff; but in the case of an extent, without a *venditioni exponas*, the sheriff cannot sell them; therefore, without giving any opinion on the other points, I am of opinion the judgment ought to be reversed for this defect. And the other judges being of the same opinion, the judgment was reversed *per Curiam*. [110]

### Rex v. Johnson.

Person not hindered of his ancient right of challenge, by the striking of a special jury at his request.

A RULE had been given the defendant to shew cause, why an attachment should not be granted against him, for challenging the array, after a special jury had been struck at his own instance and request, pursuant to the power given by statute 3 *Geo. 2. c. 25.* and this motion was grounded on the authority of the case of *Rex and Burridge*, *Trin. 10. Geo. 1.* [*Stram. 593. Lord Raym. 1364.*]

Mr. *Hussey*, for the defendant, said that the case of *Rex and Burridge*, was very different from this: for in that case *Burridge* went before the master, and had all the hundredors struck out; and when he came to trial, he challenged, for want of hundredors; so that there appeared to be a plain contrivance and trick in him, to put off the trial; whereas the chal-

lenge here taken, was a legal one, and such as was reasonable; for the sheriff who returned the jury process, was a freeman of the city of *Chester*; and so interested in the rights of the officers of this corporation, which was the subject matter of this trial; and he was further interested in this case, by advancing money for the carrying on of this dispute; and the statute 3 Geo. 2. which gives people liberty to have special juries at their own prayer, without consent of the other party, which before this statute could not be done, except in the case of trials at bar, never intended to take away that right of challenging, which the party had before the making of the act. And the precedents of rules, both in *B. R.* and *C. B.* which were made for special juries by consent, have a clause inserted, that the parties shall not challenge for want of hundredors, as in *Rex and Inhabitants of Hunsdown. Rex and Sherwood, Pas. 1 Geo. 1.* and he cited 3 *Keb.* 740. *Rex and Kiffin.*

Mr. *Abney*, and others, argued of the other side; and chiefly endeavoured to bring this within the case of *Rex and Burridge.*

*Ch. Just.* *Rex and Burridge* is an authority, where a case is circumstanced the same with that. But all contempts depend upon circumstances. I think there [111] is no difference in this case between a rule made by the motion of *A.* or his consent: but whether the party consents or not, 'tis the same thing; for 'tis the breach of the rule, which is the contempt, tho' that rule be made *in invitum.* And the attachment was granted in *Burridge's* case, for the abuse of the rule. The cause of the challenge was certainly good. 'Tis said indeed that the sheriff can't alter the array in this case; 'tis true he can't alter the names of the persons in it; but he can alter and change the order in which the names are

put, and put the first last, and *vice versa*. Notwithstanding the rule be that the sheriff shall return the jury so struck, yet I think that the suggestion of partiality in the sheriff being made on the roll, the jury process might have been returned by the coroner. Here the cause of challenge appears reasonable; and his right to it is not taken away, by the liberty of having a special jury, as the rules cited plainly shew; and therefore I think here was no sort of contempt committed by the defendant; and therefore, that the rule to shew cause why an attachment should not go against him, should be discharged. And the rest of the judges being clearly of the same opinion, the rule was discharged.

*Howard v. Poole. Strange 995. S. C.*

If two partners commit an act of bankruptcy, they are bankrupts in all respects; and cannot be said to be bankrupts, as to their joint estate, and not so as to their separate estate.

A JOINT commission of bankruptcy had been taken out against the defendant and partner; and he had obtained an allowance of the certificate of the commissioners of bankrupts, by the lord chancellor, pursuant to the statute 5 Geo. 2. c. 30. and was now sued by the present plaintiff for a debt due upon his separate account, and arrested. And it was now moved, that he should be discharged out of custody, upon filing common bail; for the defendant had pleaded in this case, that the cause of action arose before the cause of bankruptcy. And the statute 5 Geo. 2. says, that in case any such bankrupt, shall afterwards be arrested, prosecuted, or impleaded for any debt due before such time as he, she, or they became bankrupts, such bankrupt shall be discharged upon common bail. So the only question in this case was, whether the certificate under the joint commission

should operate as a discharge of all debts due upon the separate account, before the bankruptcy, as it certainly does upon the joint account.

Mr. *Taylor* for the plaintiff argued ; that in a joint commission, the separate creditors who come in under that commission, can have no satisfaction for their debts, till all the joint debts are paid off ; and therefore they ought not to be bound by such joint commission ; and that in this case the plaintiff was denied to be admitted a creditor under the joint commission ; and cited *Trin. 11 Ann. Gosling and Bunter*, to shew, that if any doubt arises with the court, they will not admit the party to common bail.

[112] Mr. *Draper contra*. The statute is in general words, that the bankrupt shall be discharged on common bail, from all debts owing by him before the bankruptcy ; and makes no distinction between a joint and separate commission. *Matthews v. Aland*, *Mich. 2 Geo. 2.* in *C. B.* cited 7 *Vin. Ab.* p. 103. c. 7. A man can't be a bankrupt, as to the joint debts, and not be a bankrupt as to his separate debts ; and therefore the separate creditors have a right to come in, under the joint commission.

*Cb. Just.* If there was any doubt in this case, the court would not discharge the defendant on common bail, according to the case cited by Mr. *Taylor* ; but in this case I think the defendant ought to be discharged, on filing common bail. The statute makes no difference between joint and separate commissions. I have heard it said, that separate commissions are often taken out to save expence ; but I think it is rather done to create expence ; and I never could see any reason for taking out both joint and separate commissions. For if two partners commit an act of bankruptcy, they are bankrupts in all re-

specis, and can't be said to be bankrupts as to their joint estate, and not as to their private ; and therefore, if the separate creditors come in under the joint commission, the joint estate shall be applied to pay off the joint debts ; and the separate effects to pay off the separate debts. And if there be any surplus of the joint estate, after the joint debts paid, it shall be applied by moieties, to the discharge of the separate debts of each. And if there be any surplus of the separate estate, it shall be applied to the discharge of the moiety of the joint debts. And this may be easily done under a joint commission ; because that seizes all the effects of the bankrupts. A discharge under a separate commission has been determined to be a discharge of debts owing under the joint trade. Before the statute 10 *Ann. c. 15.* if there were two partners, and only one party became bankrupt, and a separate commission was taken out against him, there was no doubt but that the discharge of that bankrupt, discharged him from all debts, which he owed in his joint, as well as private capacity. But the great doubt in that case was, whether by such discharge of the bankrupt, the partner of such bankrupt should not likewise be discharged from such debts as he was discharged of : and therefore, that statute has enacted that such partner shall not be discharged. If therefore a joint debt is discharged by a separate commission, there can be no doubt but a joint commission will discharge a separate debt : and therefore I think clearly, that the defendant must be discharged on filing common bail.

*Page, Just.* The suing out of a separate commission is only for the benefit of the clerks ; and spoke to the same effect with the Ch. Justice.

*Lee, Just.* The case of *Grace and Heybam, Pas.*

[113] 4 *Geo. 2. Fitz-G.* 281 was the same in effect with this. It was an action against the defendant as indorser of a note, upon his separate credit; and on evidence at the trial, he produced his certificate, under a joint commission of bankruptcy; and tho' on its being made a case and argued here, the court did not determine it; yet they seemed strongly inclined to think that the certificate was a discharge of the separate debts. But we are now to take this case on the statute and certificate; and the statute says, that he who has such certificate shall be discharged from all debts due by him before the time of the bankruptcy; and therefore we are not to consider what directions are given in equity, as to the division and distribution of the bankrupt's estate; and therefore I think he ought to be discharged. And *Probyn* Just. being of the same opinion, he was discharged, on filing of common bail.

*Scot v. Ellary.*

JUDGMENT was signed on the *Monday* morning, the rules for pleading not being out till the evening of that day; which, on reference to the master, was held to be irregular; for that the judgment ought not to have been signed, till *Tuesday*. The defendant's counsel prayed costs, which Mr. *Filmer* opposed, because this happened by mistake; which, as soon as discovered, the plaintiff offered to waive. Court asked the master whether any such proposals appeared to have been made; and on his saying he knew nothing of any such, the court gave the defendant his costs.

Costs given  
against plaintiff  
for signing  
judgment be-  
fore the rules  
for pleading  
were out.

Rex v. Bell. *Stran.* 995. S. C.

New trial in  
*quo warranto*  
refuse motion  
being made  
three years  
after the trial,  
and no reason  
assigned why  
application was  
not made  
sooner.

AN information in the nature of a *quo warranto*, to shew by what authority defendant acted as common council-man of *Marlborough*, was tried at the assizes in the year 1731, which was more than three years since; and verdict was found for the defendant; but no judgment entered. And serjeant *Chapple* now moved to have a new trial in this case, suggesting, that the verdict was given contrary to evidence; and the case was much debated on both sides: to which the Ch. Just. said thus, *viz.* This is a question of very great consequence; for in this case we are to determine, whether a new trial is grantable after three years, or any other length of time, without any sort of excuse made for not applying sooner. I will not say that, in no case, a new trial is grantable, after such a length of time, upon proper circumstances. Motions for new trials have not been very ancient; and the first that is in the books is in *Style*. I know my lord *Holt* was of a different opinion; but, with great deference to his judgment, I do not think that the reason, which he gives for it, warrants his opinion. I believe the foundation of the four days rule was, to call in the party, to shew, if he had [114] any thing to move in arrest of judgment; and not to apply for a new trial, as has been said at the bar. And the words of that rule in *Latin* shew it to be so. So the question here is, how far length of time must govern us in this determination. Suppose here, the judge, who tried the cause, had been dead, or had lost his notes of it, (which happened not here indeed) what uncertainty would there arise? But the motion in this case is more proper to be denied than most

others may be ; for if a new trial was granted in this case, the right of many persons now enjoying their offices in this corporation, may possibly be overturned, as depending on the legality of the votes of this defendant. For at the common law there is no such thing as *Lis Pendens* ; and therefore, if judgment of *ouster* should be given against him, it would have relation to the time of the bringing the information, and it would vacate every thing done by him from that time ; for he would not have the privilege, so much as even an officer *de facto* ; and therefore I think this motion ought not to be granted. And the other judges being of the same opinion, the motion was denied *per Cur.*

Middleton and his Wife v. Croft. See  
page 55—64, [2nd Ed.]

THIS case was this term argued again by Mr. Serjeant *Wright* for the defendant, and Mr. Serjeant *Parker* for the plaintiffs.

Mr. *Middleton*, after the last argument died ; but that was not abating the suit as to the wife. And lord *Hardwicke*, after these several arguments, and deliberating the case very maturely, on the 17th November, 1736, declared the opinion of the whole court to this effect : In this case there have been three questions made at the bar. First, If by the canons made by the convocation in 1603, lay people are subject to be punished for clandestine marriages ; and if they are not, then secondly, Whether the spiritual court, hath by any canon or constitution ecclesiastical, anciently received and allowed within this realm, any jurisdiction to punish the laity, for



contracting marriage clandestinely. And if they have such jurisdiction, thirdly, Whether the same is not taken away by 7 and 8 *Will. 3. c. 35. sect. 4.* by which the parties contracting marriage, without licence or banns, are liable to the penalty of £10.

The first question, concerning the objection of the canons made 1603, may be divided into two parts. The one, Whether lay people contracting clandestine marriages, are within the words and provisions of those canons; and if so, secondly, Whether those canons were ordained by such authority, as to bind the laity?

As to the first part, the canons in 1603, relating [115] to clandestine marriages, are the 62, 63, 101, 102, 103, and the 104th, and there is no pretence that any, except the 104th, doth extend to the persons contracting marriage. The 62nd, and 63rd, forbid any person to marry without banns or license. The 101st, 102, and 103d. direct to whom licenses shall be granted, and upon what conditions; and the 104th only subjects the parties to a punishment for clandestine marriage, in case they are married by virtue of a license, that wants any of the ceremonies requisite to licenses in the preceding canons. But that declaration does not extend to the present case: for the libel here does not charge any license to be unduly obtained, but positively alleges that the marriage was consummated, without any license at all; and therefore the case now in judgment, does not fall within any of the canons in 1603.

As to the second part, with respect to the authority of these canons, they are well known to derive their original from the convocation, whereto the bishops and clergy are convoked by the king's writs; and the resolutions in such assemblies are afterwards con-

firmed by the king, under the great seal. What canons are so made, then become the rule and order of government for the clergy in ecclesiastical matters. But the objection to them is, that such canons being only made by the clergy, and confirmed by the king, cannot, for want of a parliamentary confirmation, bind the laity, who have no representatives in convocation. And sergeant *Wright*, who argued for the defendant, was so sensible of the weight of this objection, that he expressly admitted that they were not obligatory *proprio vigore*; but to support the jurisdiction exercised in the spiritual court, relied on the ancient constitutions relating to this matter, which, he urged, had been received and allowed in *England*, and of which those in 1603 were only declaratory. It is not necessary, in the present case, to give any opinion concerning the obligation of these later canons. But as a contrary opinion has been warmly urged and maintained at the bar, and it has been insisted, that these canons do bind the laity merely by their own strength; therefore, to silence such novelties for the future, we have considered that matter, and are all, upon great consideration, unanimously of opinion, that the canons in 1603, do not bind the laity *proprio vigore*. I say *proprio vigore*, because there are many provisions in those canons, that only propound and declare the ancient canon law immemorially received and allowed in this kingdom. And these are in force here as declaratory of such ancient law for the discovery and illustration of the original obligation of any part of the canon laws. It may be thought useful and ornamental, to look back into our British and Saxon councils. But to any one, who will take the pains to consult the learned Sir *Henry Spelman*, it will easily appear, there was such a mixture of laity and

clergy in them, that it is impossible to form any certain idea, how they were composed. The barons, clergy, and commons, assembled themselves so promiscuously, that whether they came together, by election, by writ, or how otherwise, is uncertain; and after the Norman line came hither, the legatine authority, which was founded on papal usurpation, prevailed so much in the councils of that age, that their authority is of very little weight amongst us. By the general nature, and fundamental principles of our constitution, it is undoubtedly certain, that the people of *England* are bound only by such laws as have the consent of the whole legislature, which consists of the king, the peers, and the commons in parliament assembled. To produce authorities to prove this proposition, would be to dispute whether it is now day, or not. The famous parliament *Roll. 2 H. 5. No. 10.* is well known; none of these constituent parts have separately any power to bind the people. The power of the king, in this realm, is that of a liege lord over his subjects; but that singly imports no authority to make, or even alter any laws. *12 Co. 75.* The voice and authority of the lords depend on their hereditary dignities and baronies; and by this they are enabled to bind themselves and their heirs: and the authority of the commons is a delegated power, which they receive from the suffrages of their electors, *4 Inst. 1.* And under some of these classes, every member of this kingdom gives his assent to such things as are established in parliament. But in ecclesiastical canons and constitutions, all these qualifications, except the royal assent, are wanting. Indeed, *Dr. Andrews*, who argued for the defendant, endeavoured to avoid the force of this argument, by saying, that the obligation of acts of parliament did

not arise from an actual representation of all the people of the realm, but only from an implied representation, created and constituted by law. And to prove this, he observed, that many of the subjects of the realm, had no share in the election of members of parliament; such as women, persons not having a freehold of forty shillings a year; not being citizens or burghesses of any place that send representatives to parliament. And he argued, that the laity of the kingdom, were not as much in this sense represented, as the clergy themselves; the parson of every parish, in all spiritual matters, representing his congregation, and voting for them in the choice of a proctor, as well as himself. But this objection does not disprove the universality of an actual representation of all the subjects of *England* in parliament; and the supposed authority which the parson has to vote for his parishioners in the election of proctors, is a novelty, as yet unheard of in the law. Parsons are almost always named by a private patron, or the ordinary; and but seldom, if ever, comes in by the parish. How then is this fancied power derived? When does it commence? From his presentation or induction? Certainly from neither? such an extensive jurisdiction as this can never flow from the patron granting the one, or the officer, who executes the other. It cannot be in their power to bind the parishioners, or any part of them, in such an important article, as the delegation of their right to join in the election of a special proctor. And it is plain from the writ to summon the convocation [4 *Inst.* 4.] that the laity have no title to vote in such election; nor are represented by any part of the convocation, which is solely, and only the representative of the clergy. The writ is directed to the bishop of

the diocese, *præmonientes decanum, & capitulum ecclesiæ vestræ, ac archidiaconos, totumque clerum vestræ diocesis.* and then the writ describes by what persons they shall appear, *decani, & archidiaconi in propriis personis suis, ac dictum capitulum per unum;* and the residue of the clergy in each diocese, *per duos procuratores idoneos, plenam, & sufficientem potestatem ab ipsis capitulo & clero divisim habentes.* So that it is most manifest, from the nature of their summons, and the common and obvious sense of the writ, that the proctors represent the clergy only, and have no such implied authority, as was pretended, from the laity.  
4 *Inst.* 322.

Thence arises a distinction between canons made by general councils assembled by the *Roman* emperors after their conversion to Christianity, (which canons were afterwards confirmed by the emperors,) and constitutions made by national and provincial synods. The former, so far as they were lawful in themselves, bound the whole empire; for the emperors, after the introduction of that sort of government, having the supreme legislative authority vested in them, whatever constitutions they ordained or confirmed, could not want any other concurrence to give them the force of laws. This authority was essentially inherent in the imperial dignity, and does not arise from any pretended power in the emperor, as head of the Christian Church. *Justin. Inst. lib. 1. Tit. 2. sect. 6. Dig. lib. 1. Tit. 4. de constitutionibus principum;* and consequently such constitutions must oblige the whole *Roman* empire. But in *England*, the king has only a share in the legislative power; no laws being of force to bind the commonalty of this realm, except such as are pronounced in parliament; and on this foot, the case of *Matthews v. Burdett* in *Salk.* 673.

though only the argument of counsel, is of present weight. It was said the emperors confirmed the ancient constitutions, only to give them a civil sanction; and that where the law gives power to any society to make ordinances, it implies the consent of the whole realm, to such as shall be agreed by the body. But this is directly to beg the question, whether the law has empowered the clergy, with the consent of the crown, to ordain canons, that shall bind the whole community. And besides, from what has been said, it is further plain, that the law has intrusted no such power with the clergy. It is a certain rule, that those who are able to enact laws, to oblige the whole realm, have also an equal power to impose taxes; and yet the clergy, in their grant of aids, never  
[ 118 ] assumed an authority, to charge any other persons but themselves, with tenths, or fifteenths, or any other subsidy. It is certain they never pretended to charge the laity with a tax of one farthing; nor can they create any new fees to themselves; and is it not strange, that being restrained from imposing the least pecuniary burthen on the laity, they should have it in their power to affect them with ordinances and constitutions, attended with great penalties and punishments, and highly injurious to their common liberties? Of what force such constitutions have always been esteemed, even by the clergy themselves, is best discovered by the usage and practice of the clergymen, since the reformation. The most spiritual matters appointed in convocation, whenever they were intended to bind the laity, have, by the clergy themselves, been always propounded to be enacted and confirmed by the parliament. The Rubrick itself, that great canon, by which the divine worship of this kingdom is established, as it wanted, has obtained

this approbation to give it the authority of a law. It has been objected, that this was only done to enforce conformity in public worship, by temporal penalties, and this indeed, might be one reason; but who can believe it to be the only one? If the clergy had been satisfied with their power to bind the laity in spiritual matters, can it be imagined, they would have called the parliament in aid, to enforce their constitutions? The law has armed them with a power of excommunication, and other ecclesiastical censures, for the breach of the laws; and it is probable, surely, that they would have trusted to these ordinary ways of proceeding, in case their decrees in *rebus ecclesiasticis*, had been obligatory on the laity. The convocation has always been considered, as a learned and religious assembly, proper to consider, and propose regulations in ecclesiastical matters; but were never looked on as a part of the legislature. It was objected likewise, that as to the jurisdiction of the *Spiritual Court*, it is conversant about spiritual things, and that that court may exercise this jurisdiction in a judicial manner, in such instances as are purely spiritual, and fall within the provisions of the spiritual law; therefore the power of the convocation must be co-extensive, with the jurisdiction of the court; and consequently the convocation may make ordinances and constitutions in matters merely spiritual, and such as shall bind the laity. But this argument takes too much for granted, and would, in the end, give the clergy an authority to alter the temporal laws. The *Spiritual Court* has confessedly a jurisdiction concerning testaments, marriages, tithes, and many other spiritual rights; and if, because this court has a general jurisdiction in those instances, the convocation should be able to make any new regu-

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lations about them, they might limit, or enlarge the degrees of consanguinity, abolish the force of testaments, vary the right of tithes, or make other alterations about such things as fall within the jurisdiction of the court, however contradictory they might be to the provisions of the common law. This court is unquestionably the proper place, for the trial of general bastardy. 2 Roll. Abr. 589. pl. 8. And if, because this single point belongs to the spiritual jurisdiction, the convocation might decree what they pleased to be bastardy; they might then, by the same authority, alter the established rules of descent. And yet we see by the statute, *Merton c. 9. 2 Instit. 96.* when the clergy applied to parliament, about the question of general bastardy, whether one born before marriage was, in case of a subsequent marriage, a bastard, which they pretended was otherwise, because by the law of the church, such an one was legitimate, *omnes comites, & barones una voce responderunt, nolumus leges Angliæ mutari.* The laws ought to be our guide, in judging of the extent of the spiritual authority. The arguments produced in favour of such pretended legislative authority in the convocation, that are drawn from other foundations, must deceive us: and the only way to determine rightly about it, is by considering the several acts of parliament, and the judicial resolutions in our books concerning this point. And it is again observable in the first place, that no material point of spiritual jurisdiction, has ever been altered since the reformation, when such alteration was designed to be universal, without the assent of parliament. The following instances are proofs of this proposition. When several very important questions, concerning the sacrament, celibacy, and vows of widowhood, were much agitated, a synod was con-



vened, not to settle, but to propose and examine those questions; and when they had maturely discussed them, then they were finally determined in parliament. 31 *H. 8. c. 14.* When the fees for the probate of wills, were to be regulated, the business is assigned to, and performed by the legislature, 21 *Hen. 8. c. 5.* So when the law concerning the administration and distribution of personal estates, was to be altered, the parliament was applied to, 22 and 23 *Car. 2. c. 10.* Indeed, the case in 1 *Roll. Abr. 909. Let. I. pl. 5.* seems, at first sight, to sound strong in favour of the canons; for there it is said to be held that the canon of the 1 *Jac. c. 93.* had altered the law as to *bona notabilia*. But, however, that case proves very little; for *Perkins' Profit. Book*, p. 94 *f. 489.* says, there are many authorities before that canon, to prove that *bona notabilia*, must be of the value of forty shillings; and admitting there were none, yet such an alteration could never affect the laity. It concerns a point of jurisdiction only between the archbishop and his suffragans; and consequently this canon has only that force, which is allowed to all canons concerning matters of spiritual jurisdiction, which is to bind the clergy themselves. But what makes the case in *Roll. Abr. 909.* very suspicious is, that lord *Coke*, 8 *rep. 135a.* in reporting the principal point, takes no notice of this point, which it is natural to imagine, a person so jealous of the spiritual jurisdiction, would have done, in case it had been resolved, or if resolved, had been looked on as an alteration of any part of the common law. [120]

As to the power of convocation, as stated in the several acts of parliament concerning that body, there is no positive declaration to be met with about it. The obligations arising from their canons, is not

defined. The statutes of uniformity already taken notice of, suppose the power of binding the whole realm, even in spiritual matters, to reside in the parliament.

In the dawn of the reformation, when the usurpation of the papal authority came to be inquired into, and the clergy, as conscious of the weakness of many of their constitutions, were desirous to put the church matters in a way of being thoroughly established ; instead of setting themselves to make any canons to confirm, or enlarge, their jurisdiction, they humbly submit their case to the king in parliament ; and accordingly, by 25 *Hen. 8. c. 19.* confess, that convocations ought only to be holden by virtue of the king's writ ; and in *verbo sacerdotii*, promise they will not presume to make, or execute, any new canons, unless the same are enacted in a convocation held by such writ, and afterwards confirmed by the king's royal licence. And whereas, before that time, many canons, provincial and synodal, have been enacted, which have been taken to be prejudicial to the prerogative, and repugnant to the laws of this realm, and also much onerous to his majesty, and his subjects : they do therefore beseech the king, that the judgment of the ecclesiastical canons and constitutions, then in being, may be referred to the king's highness, and two and thirty persons, whereof sixteen to consist of the temporality of the upper and lower house of parliament, and the other sixteen of the clergy ; and that these commissioners may abolish such of the said canons as shall be found to be repugnant to the laws of the realm, and that the rest may stand in full force, the king's royal licence being first obtained to the same. And accordingly it is enacted, that the king shall have at his pleasure,

authority to assign such commissioners, with such powers as aforeſaid, provided that no canons, conſtitutions, or ordinances, ſhall be made, or put in execution within this realm, by the authority of the clergy, which ſhall be contrariant, or repugnant to the king's prerogative royal, or the common laws, or ſtatutes of this realm. Provided alſo, that ſuch canons, &c. ſynodal, and provincial, being already made, which be not contrariant to the laws, ſtatutes, and cuſtoms of this realm, nor to the damage of the king's prerogative royal, ſhall now ſtill be uſed and executed, as they were before the making of this act, till ſuch time as they ſhall be viewed, ſearched, or otherwiſe ordered and determined by the ſaid thirty-two perſons, or the moſt part of them, according to the tenor, form, and effect, of this preſent act. This power was given again to the crown by 27 *Hen. 8. c. 15.* and laſtly, by the 35 *Hen. 8. c. 16.* was confirmed on the king during his life; and after his death, by 3 *Edw. 6. c. 11.* was conveyed to king Edward for three years. [121]

It is not in any of theſe ſtatutes declared, what perſons are bound by a canon; but it is obſervable, that both the king and the clergy thought it neceſſary to have the conſent of the parliament, to make any effectual alterations in the canon law. If the power of doing this had been lodged in the crown, and the convocation, there was no neceſſity to have proceeded this way. But by the wiſdom of thoſe times, it was thought proper only to rely on this method. If the commissioners under theſe acts of parliament, had made any alteration in the canon law, what they had ſo done muſt have been conſidered, as done by the parliament. For nothing is more certain, than that every act done under a power, is ſuppoſed to be done by the grantor of that power,

and not by the persons to whom the power is derived: and consequently the decrees of the commissioners authorised by the legislature, must have been the decrees of the legislature itself. The misfortune is, that nothing was done by these commissioners; but they left the power of the convocation, and the force of the canons, just where they found them. As to the cases in law that have been cited, they are these. The *Prior of Leeds's* case. 2 *Bro. Ab. tit. Ord.* 112. p. 1. *H. 19 Hen. 6. fol. 51. pl. 12. M. 20 Hen. 6. fo. 12. pl. 25.* The case was, that the clergy in convocation, granted a tenth to the king, with a clause in the grant, *quod nulla privilegiata persona*, should be discharged from the collection of this tenth. The prior was a member of this convocation, and had a grant from the king, to exempt him from all collections of any kind; and the bishop of the diocese, sending his mandate to the prior, to collect this tenth, and pay it into the *Exchequer*; the prior applied to the court of *Exchequer*, to have his charter of exemption allowed; and the question was, whether he, being a member of the convocation, which made this grant, ought not to have shewn his letters of exemption there, or had not renounced his privilege, by joining in the grant. And it seemed to be agreed by all the judges, that in temporal matters, the convocation had no jurisdiction; and *Newton* expressly said, that the convocation had authority to appoint, *holidays* and *fasts*, and to make constitutions provincial, by which the clergy shall be bound, but they cannot do any thing to bind the temporality, that is, the temporal persons. From whence it was inferred, that their jurisdiction over the clergy, was only in spiritual matters; but to bind the laity in any thing they had no jurisdiction at all.

*Dr. Andrews*, in answer to this, argued, that *Brooke*,

in abridging the case, had misrepresented the words of *Newton*, which were, *la temporalitie*, i. e. *temporal rights*; and that they did not contradict the ecclesiastical authority, in spiritual matters, to bind the laity; but the sense of the book is plain: after the power of the convocation over the clergy is stated, in opposition to that, he describes their authority to bind the laity; and it would be absurd to suppose he meant only the property of the laity, since he expressly confines their jurisdiction over the clergy, to matters merely spiritual. And this mistake of the doctor, arises from consulting the last edition of the year book, which is misrepresented in this place; for, upon looking into the first edition, from whence it is probable *Brooke* abridged the case, the exception is *le temporalitie*; and this reading answers the sense of the book. The next case is the *Abbot of Waltham's*. *M. 21 Ed. 4. fo. 44. pl. 6.* There the power of the clergy is confined within the same bounds, and *Pigot* and *Catesby*, speaking of the convocation, say, their authority to bind the clergy in spiritual matters, is as strong as an act of parliament over the laity, because they are represented in convocation, as well as the laity are in the parliament. But it is not hinted that the laity have any representatives in this religious society; nay *12 Co. 73.* is expressly otherwise. *4 Inst. 322.* [122]

There is, indeed, an exception at the end of that case, in *12 Co. 73.* which has been relied on, in favour of this pretended jurisdiction; as if the canon, or statute law, in spiritual cases, and for spiritual persons, might be altered in convocation. But it is certainly misrepresented, being nonsense, and directly contrary to the preceding part of the case, which expressly resolves that every canon to bind any person, must consist with the prerogatives, the common, and the

statute laws, and the customs of the realm. So there is no weight to be laid on that exception, nor shall I endeavour to give any other answer to it.

If it be demanded what canons, and constitutions, synodal and provincial, are yet in force within this realm? I answer, that it is resolved and enacted by the authority of parliament, that such as have been allowed by general consent and custom within the realm, and are not contrariant or repugnant to the laws, statutes, and customs, of this realm, nor to the damage nor hurt of the king's prerogative, are still in force within this realm, as the king's ecclesiastical laws of the same. Now, as consent and custom hath allowed those canons, so no doubt, by the general consent of the whole realm, any of them may be corrected, enlarged, explained, or abrogated. Without this common consent and allowance, the canons extend to the clergy only; and when they shall bind the laity, can be discerned only by this rule. *Moore, Case 1043. Cro. Jac. 37. Moore, Case 1083.* It is agreed, that ecclesiastical ordinances in spiritual matters, confirmed by the king, bind the clergy, being made by their representatives in convocation. To this agree, *Salk. 134. Carth. 485. pl. 5.* But there it is expressly resolved, by *Holt, Ch. Just.* and the court, that they must be confirmed by parliament, to bind the laity. And that the resolution of the court was, in this point, as Mr. Serj. *Cartwright* represented it, I am fully convinced, having seen two other reports of the same case, corresponding with this; the one by my lord *Raymond*, the other by Ch. Just. *Eyre*; and in lord *Raymond's* report, *Bishop of St. David's v. Lucy*, p. 449, are the words, *for the clergy are subject to a law different from that to which laymen are subject, for they are subject to obey the canons, for the convocation of the clergy may make laws to bind all the*

*clerks, but not the lay people.* In the case of *Britton* and *Standish*, 6 *Mod.* 189. Lord *Holt* declares himself plainly; that canons made by the convocation cannot, *proprio vigore*, bind laymen; and must crave the support of use and custom to authenticate them. Indeed this book, of itself, is of no great authority; but agreeing with what is reported in *Carth.* to be said by *Holt* on the like occasion, the credit of it, in this instance, cannot reasonably be doubted. In *Davis* his case *Mich. 5 Geo.* in *C. B.* which was a prohibition to the consistory court of *St. David's*, where one was libelled for teaching school, without a license; a prohibition indeed was denied, because the statute for preventing the growth of schism, was then in force. But lord *Ch. Just. King* said, it was the prevailing opinion, that lay-men were not bound by the canons in 1603, and consequently not punishable in the spiritual court for a breach of them. The cases cited in support of the canons and the ecclesiastical jurisdiction, were these following; *Bird* and *Smith*, *Moor* 781. *Ca.* 1083, which was a bill brought by a person put into the possession of a rectory, under the writ *de vi laica removenda*, to restrain the former rector from taking possession again of the rectory, till a sentence of deprivation pronounced against him was defeated; upon which sentence the title of the plaintiff in chancery was founded. It may be said in general very truly, that the case is an extraordinary one; for it is in effect turning out a rector pending an appeal; and such a case as would hardly stand for a precedent at this day; and therefore the authority of it more to be suspected. The reason for citing this case was on account of the third resolution contained in it, which is this; that the canons of the church made in convocation, with the king's assent, tho' without the parliament, shall bind, in all matters

ecclesiastical, as well as an act of parliament ; for that by the common law, every bishop in his diocese, and archbishop in his province, and the convocation in the whole nation, might make canons, to bind all persons within their respective limits: because the convocation of the clergy, being one branch of the parliament, and severed only for their own ease, must yet retain their proper and peculiar authority, when met together. And as a clergyman can't be a member of parliament, nor a lay-man a member of the convocation ; so the convocation may make canons about things appertaining to their authority ; and these canons, confirmed by the king, shall bind the whole realm. Laying aside the peculiarities of this case before mentioned ; yet it is remarkable that the book does not expressly say, that the laity are bound by such canons ; and as both the parties before the court were clergymen, all that was necessary to be determined in the case was their obligation over the clergy. And if this resolution be construed according to the subject matter of the question, which was their force

[124] over clergymen in spiritual matters, it may safely be admitted to be good law : but as a warrant to prove the power of the clergy in binding lay-men, it can never be allowed. The next case cited is *Hill and Good. Vaugh.* 327. where *Vaughan* Ch. Just. in delivering the resolution of the court says, a lawful canon is the law of the kingdom, as well as an act of parliament. But it is worth noting on this saying of his, That he does not define what is a lawful canon ; nor does he acquaint us what must be the subject of, or who are the persons that must be bound by such a canon. The case of *Grove* and *Dr. Elliot*, 2 *Ventr.* 41. and the opinion of *Vaughan*, as to the obligation of canons made by the convocation, and confirmed by the crown, in church matters, over the



laity themselves, has been much relied on. But that case was only on a motion for a prohibition, not much considered, and the opinion cited, not at all pertinent to the point of the case. Besides, Mr. Justice *Tyrrill*, is of a direct contrary opinion; and holds, that the king and convocation, without the parliament, can't make any canons which shall bind the laity. And this rule is founded on the reason of the thing itself, and also confirmed by subsequent declarations of parliament. In the preamble of the statute 25 *Hen. 8. c. 21. concerning Peter-pence and dispensations*, are these words; after setting forth the usurpation of the popes, it goes on, "That this realm recognizing no superior under God, but the king, but being free from subjection to any man's laws, but only such as have been devised, made and obtained within this realm; or to such as by sufferance of the king and his progenitors, the people of this realm have taken at their free liberty, by their own consent, to be used amongst them, and have bound themselves, by long use and custom, to the observance of the same; not as to the observance of any laws of any foreign prince, potentate, or prelate, but as to the customs and ancient laws of this realm, by the said sufferance, consents and custom." And the like declarations are made by the stat. 25 *H. 8. c. 19.* 35 *H. 8. c. 17.* and 3 and 4 *Edw. 6. c. 11.* From whence it is plain, the parliament took it, that such constitutions, as had by immemorial usage, prevailed amongst us, had obtained the force of a law. And Sir *Matthew Hale*, in a learned manuscript, that I have seen of his, gives an account, how he supposed the canon law came hither. "I conceive, (says that great lawyer,) that when christianity was first introduced into this Island, it had some external discipline, and this discipline became

[125] binding, either by the powers of the governors who imposed it, or else from the voluntary submission of those who received the religion. If we suppose the governors of the nation, who had the legislative power, commanded it, the obligation is perpetual; but if it obtained by the consent and submission of single persons, who embraced this religion, then it bound them only during their own lives. However, their descendants afterwards, submitting to the same rules, in process of time, they prevailed universally; and in the end grew into general customs, and so obtained the force of a law." In the present case, an old constitution of archbishop *Stratford* was produced, *Lynd. Provinciale, lib. 4. Tit. 3. Humana Concupiscentia*, which is only adopted from the decretals. And to shew that this constitution is of force in *England*, Dr. *Andrews* cited several cases out of the registry of the archbishop of *Canterbury*, and particularly one of lord *Coke, C. J.* who submitted to spiritual jurisdiction, for being married in a house, without license or banns. But these precedents, we think, are of no great weight to prove the allowance of this constitution. They must have passed *sub silentio*; and the parties might think it more prudent to submit, than engage in a dispute that would make a noise in the world, whether the spiritual court was justifiable in their proceedings or not. But however, we are all of opinion, that for the marriage without banns or license, and in a private house, the spiritual court hath a proper jurisdiction, not founded on such loose uncertain grounds as the precedents now produced, but established on the firm basis of a judicial resolution in a temporal court. Sir *W. Jones* 257, *Matingley v. Martyn*, where, by six judges against *Whitlock* and *Croke*, it is determined, that if any marry without

proclamation of banns, or license to dispense therewith, they may be cited into the spiritual court. This resolution, pronounced with such deliberation, we think entirely establishes the force of the above-mentioned constitution. This is the strongest evidence of its consent and allowance. And indeed it would be very strange, that seeing clandestine marriages have always been so much complained of, and found so injurious to the public, if they were entirely punishable till the statute 7 and 8 *Will. 3.* which introduces the last great question. Thirdly, Whether this jurisdiction so vested in the spiritual court, be taken away by the act 7 and 8 *W. 3. c. 35.* But I must premise, first, that if the stat. did repeal the spiritual law; yet it extends only to the husband, he alone being liable to the forfeiture: so that, at all events, a consultation must go against the wife. But however, to settle this great question, which has been so much relied on, we are, upon consideration, all of opinion, that the stat. 7 and 8 *W. 3. c. 35.* has no influence or operation on this case. Whether an act of parliament, which gives the penalty for the commission of an offence, of which the spiritual court has a jurisdiction, without a saving of their jurisdiction, destroys the jurisdiction of that court, has been a question very much agitated in our books. In 2 *Ventr. 41.* The court held, they may proceed in the spiritual court, as for an offence against the spiritual law, tho' it is also made an offence against a statute, 2 *Lev. 222.* *Cory and Pepper*, was a suit in the spiritual court, for teaching school, without license; for which a penalty of £5. is inflicted by 13 and 14 *Car. 2. c. 4. s. 11.* Yet resolved this did not take away the spiritual jurisdiction arising from the canons. But Sir T. Jones 131. *Hill and Boomer*, *Cartb. 464.* *Cbedwick* [126]

and *Hughes* are to the contrary. The case of *Matthews* and *Burdett*, *Salk*. 672, was on the same point, but never determined.

It must be admitted, where the temporal and ecclesiastical punishments are for the same offence, the rule that *nemo bis puniri debet pro uno & eodem delicto*, is a strong objection; for tho' the party should, upon a proceeding in the spiritual court, be acquitted or convicted; yet *auterfois acquit* or *convict*, could not be pleaded to an action on the statute for the same offence.

As to the case on the statute for teaching school, without license; the intent both of the temporal and spiritual proceeding is the same; namely, to prevent improper persons from teaching school. But the design of the penalty given by the act, 7 & 8 *Will.* 3. c. 35, was not to punish the offence, as a crime against the spiritual law, or any rule of spiritual government; but purely to enforce the payment of the duty upon licenses, and to prevent frauds in the public revenue. This is evident by the recital introducing the 4th. section of that act, on which the question arises. The words are: "For the better ascertaining, collecting, and levying, the several duties, granted upon licenses of marriage." So that it is plain, the proceedings are *diverso intuitu*, & *pro diversis rationibus*. 2 *Inst.* 622.

The case on the 18 *Eliz.* c. 3. concerning bastards, is much stronger. That statute gives a power of correcting the parties offending, but not as for a spiritual offence; but to punish such as brought charges on parishes, by their incontinency; and accordingly these jurisdictions have always gone hand in hand.

Thus we think a substantial diversity is made where the ecclesiastical jurisdiction may be supposed to be

annulled. The common difference that is taken, that proceedings in the spiritual court are *pro salute animæ*, and the civil suits for temporal punishment, is of very little weight, and a distinction in words only : for all punishments, whether in one court, or another, are for reformation of manners, and consequently *pro salute animæ*.

There is yet another ground, on which the ecclesiastical authority, as to this point, is supported, which is the Rubrick, that speaks of banns. This is confirmed by the several acts of uniformity, as 5 and 6 *Edw. 6. c. 1. s. 4. 1 Eliz. c. 2. s. 16*, which gives all ordinaries, within their jurisdiction, power to punish offences against it. And lastly, the statute 13 and 14 *Car. 2. c. 4. s. 24.* from whence it follows : first, that the laity, are bound by the Rubrick, for marrying without publication of banns. Secondly, they are liable to be punished for offending against the Rubrick, as for the breach of an act of parliament. And from hence a new question, 'not moved at the bar, may be made, Whether, supposing the statute 7 and 8 *W. 3. c. 35.* should amount to an extinguishment of the spiritual jurisdiction, as built on the ancient constitutions ; yet it should be deemed to be a repeal of that jurisdiction constituted by the said acts of parliament ; which settle the uniformity. And it is a certain [127] rule, in general, that *leges posteriores priores contrarias abrogant* : but when a subsequent affirmative law gives only a penalty, that never, of itself, was esteemed a repeal of precedent laws. Acts of repeal in the affirmative must imply some sort of contrariety, something evidently inconsistent with those before in being. But that is not the case in statute 7 and 8 *W. 3. c. 35* ; for the penalty there, is given with a different intent, than the acts of uniformity were

penned with. These were designed to make a conformity in the public worship, and in matters of religion; but that was calculated to chastise any frauds in the public revenue. As clandestine marriages have at all times been found to be productive of many and great evils to the nation, we were willing to settle the law on this head.

The rule in this case must be, that the prohibition shall stand, as to the suit for being married between the hours of one and eight in the morning; and not between eight and twelve; for we can find no law to support that part of the libel, except the canon in 1603. And if we should not prohibit the spiritual court from proceeding in those articles, they might convict the party on that, tho' they should acquit her upon the other. But as to the residue of the libel, for marrying without banns or license, in a private house, and not in a church or chappel, a consultation must be awarded.

*Smith v. Bouchier & al. See*

*page 89—92. [2nd Ed.]*

**M**R. *Denison* now argued for the defendants, that this action would not lie, either against the judge, or officers, and for that purpose cited *Gwinne* and *Poole*, *Lutw.* 935 & 1560. *The case of the Marshalsea*, 10 Co. 68. b. 1 *Ventr.* 273. *Hob.* 63. 3 *Lev.* 203. 8 Co. 121. *Whitcroft* and *Colcroft*, *Hill.* 1728. in *C. B.* where it was held that false imprisonment would not lie against the recorder of *Grantham*, for the holding a man to special bail, when no affidavit of the truth of the debt had been made, previous to the arrest; for that the party's remedy was by action against the plaintiff.

Mr. Draper said, the reason of the resolution in the case of *Whitcroft* and *Colcroft*, was, because the statute 12 Geo. 1. c. 29. does not make the arrest, without such an affidavit, void.

Ch. Just. This case falls within the reason of the case in *Hob.* 63, and must be governed by it; for that case shews, that the want of jurisdiction of the process, is as fatal as the want of jurisdiction of the cause. In *Hob.* the judge had jurisdiction of the person and the cause; but not of the process, as exercised by word of mouth; when by the custom it should have been by precept in writing. So here, tho' the judge had jurisdiction over the party and the cause; yet by the custom of *Oxford*, as set forth in his plea, he had no power to issue his warrant, to take the now plaintiff, but upon oath made before him, that the plaintiff believes the defendant is going to run away, which appears plainly to be a condition precedent to the judge's granting of his warrant. But that not having been done in this case, I think the judge had no jurisdiction or power, to issue this warrant; and therefore that judgment must be given against him. And as all the parties have joined in this justification, judgment must be given against them all. And therefore I think 'tis not necessary to determine now, how far the officers or plaintiff could have justified, if they had pleaded separately; but I should think that the plaintiff would scarce be able to justify in this case. [128]

Lee, Just. In this case the judge had no jurisdiction to issue his warrant without oath; for the custom to issue the warrant must be taken entire, part of which is, that it must be upon oath; and therefore that must be taken to be part of the custom: so here it is an absolute want of jurisdiction *in toto*.

*Cur.* gave judgment for the plaintiff against all the defendants.

**Coward v. Porter.**

**T**HIS was a motion by Mr. *Strange* and others for a new trial in ejectment brought for two mills and four acres of land; and they produced the affidavits of five of the jurors, who gave a general verdict at the trial, that they intended to find for the plaintiff, but for one mill and three acres of land. But Mr. Just. *Lee* told the court, that he had waited on the Ch. Justice who tried the cause, and that he was very well satisfied with the general verdict, which they had given for both the mills, and the four acres of land; upon which the whole court said, that they would not suffer any affidavits to be read, which were made by the jury to explain their verdict, after they had such a certificate from the judge, who tried the cause; for that it would be attended with very mischievous consequences, if they should do it; and therefore denied the motion.

Court will not read affidavits in contradiction of the certificate of the judge who tried the cause.

**Hepburn v. Percival.**

**A**FTER argument, it was held by the court that the clerk of the papers has an equal right to make up the paper books in special pleas, by original, as he has on proceedings by bill; and they said, that this point has been already determined three times. And note, it seemed to be agreed, that this office was first instituted, about the beginning of the reign of *James the First*. But the attorney said he had searched all the records of that time, and could find nothing concerning it.

Making up paper-books belongs to the clerk of the papers, as well in causes by original as by bill.



## Rex v. Dr. Holmes.

[129]

Information refused against the vice-chancellor of Oxford, for discommoning a person who set up a tavern without license.

ONE *Dawson*, by the license of the mayor and corporation of *Oxford*, set up a tavern, for the selling of wine in that city; for which the convocation of that university ordered him to be discommoned; because, by their customs, they say, that there are but three taverns within the university, which are to be licensed by the university: and that such there were before he set up this. An instrument for discommoning him was drawn, and signed by the defendant *Dr. Holmes*, the vice chancellor, and fixed up at the public places in the university, forbidding all persons who were matriculated into that university, to have any dealings, &c. with him. *Dawson* willing to try what right the university had to exercise this power, moved for an information against *Dr. Holmes*, for being instrumental in the making and signing this order, and fixing it up in so public a manner. And a rule was given to shew cause, which was done; and the court said, that there was no foundation for granting this information; for that here appeared to be no personal misbehaviour of *Dr. Holmes*; for that what he did, was only agreeable to what was his duty, according to the usage, which has been long practised in that university; and that if this information was granted, no judge, who should try, would determine upon the lawfulness of the custom, which they now pretend to. And therefore, if *Dawson* has a mind to try the authority which the university had to discommon in such case, he should have moved for an information in the nature of a *quo warranto*, against the university of *Oxford*, to shew by what authority they claimed the privilege of discommoning

in such cases; or else have brought his action on the case.

Turner v. Cordwell.

CASE on several promises. Defendant pleaded in abatement, that his name was *Cordwell*, and not *Cordwall*, as mentioned in the declaration. The plaintiff replied and traversed the plea, and concluded to the country. The defendant demurred to the replication; and the plaintiff joined in the demurrer, and prayed judgment of the action, and his damages, instead of a *respondeat ouster*.

Plea in abatement; replication thereto; defendant demurred as in abatement; but the plaintiff joined as in bar, and held to be a discontinuance.

Mr. Parker for the defendant said, that by the plaintiff's concluding his joinder in demurrer in bar, instead of abatement, he had discontinued his action; and for that cited 1 Sid. 252. 1 Lev. 163. Yelv. 112. Aleyn 65. Show. 155. Salk. 177. 3 Mod. 281. Comb. 479. Salk. 218. 1 Show. 4. Carth. 433.

[130] Mr. Denison said, Carth. 137. states the same case with Salk. 177. quite different from what that book does; and that Salk. must be mistaken. Salk. 3 and 4. 3 Lev. 291.

Ch. Just. The rules of pleading are nice, but still they must be observed; and in *Liford's* case 11 Co. 46 b. it is held that every plea must have its proper conclusion: and the reason given for it is, that good pleading is like good logick. And therefore 'tis necessary, that the party not only lay his premisses before the court; but that he must likewise conclude rightly and logically from them, that the court may see whether he concludes rightly from his premisses or not. In the case of *Biffe* and *Harcourt*, Salk. 177. it is said by *Holt*, that it was a replication at large; by which he meant, that the plaintiff had lain the fact before the court, but had not shewn

what intent he did it for. And I believe *Show. 155.* has mistaken that case. Now if the rule of pleading be, that every person must conclude well; here is a plea in abatement, and the replication is right; and the demurrer to it is likewise concluded properly in abatement. But the plaintiff has joined in the demurrer and says, that his replication is sufficient to compel the defendant to answer; and then concludes with praying judgment of the action and damages; which being a joinder in demurrer, in bar to a plea and demurrer in abatement, is certainly wrong. *Salk. 219.* was a demurrer to a demurrer, instead of a joinder in demurrer; and held to be a discontinuance. And I cannot distinguish the present case, from the cases which say, that the party must not only lay his case well before the court, but must likewise conclude well, to shew to the court, what use he would make of the premises. And therefore, upon the whole, I think that the plaintiff has discontinued his suit. Some days after this, the whole court said, they were of opinion, that this was a discontinuance; and therefore they gave a rule that the suit should be discontinued; for, in this case, they could not give judgment for either party.

*Rush and Allen, Assignees of Ryland, a  
Bankrupt v. Baker.*

*A. commits an act of bankruptcy in November. In December his goods were taken in execution and*

**T**ROVER by the plaintiffs against the defendant on this case: *Ryland* became a bankrupt in *November, 1733*; but a commission of bankruptcy was not taken out against him till the *January* following. The defendant *Baker* had judgment against *Ryland*, and took out execution against him; and the

[131] Sheriff's officer, by virtue of a *fiery facias*, on the 24th December 1733, levied goods and chattles, and £500 in money, of the property of *Ryland*; and the defendant in this action gave the Sheriff a bond to indemnify him in this execution; and £300 in money was paid over to the now defendant in consequence of it. This was plainly proved at the trial; and likewise that the plaintiff had made no demand of these goods, &c. of the defendant before the bringing of the action. Lord *Hardwicke*, who tried the cause, was well satisfied that this action was well brought against the now defendant, who was plaintiff in the execution, without joining the officer who took the goods, and making him a defendant in the suit; and therefore ordered the jury to find for the plaintiffs, which they did. But Mr. *Abney* not being satisfied with this opinion, did now, by leave of my lord *Hardwicke*, move for a new trial, in this case; and first objected, that this action should have been brought against the officer and plaintiff jointly, or against the officer only, and not the plaintiff in the execution; because the property of these goods was not vested in him, nor could they be said to be in his possession; and cited *Cro. Eliz.* 219. 2 *Bulst.* 311, 12. 2 *Mod.* 242. Secondly, here was no property vested in the assignees to maintain trover. Thirdly, here was no conversion appeared to be by the defendant, because there was no demand proved.

sold, and the money paid to the plaintiff in the execution. In *January* a commission was taken out against *A.* And the assignees brought trover for the goods against the plaintiff in the execution; and adjudged that the action well lay.

Mr. *Agar* cited the case of *Willbraham* and *Snow*, in 1. *Sid.* 438. & 2 *Saund* 47 a. to shew that the possession belonged to the officer, and not to the plaintiff in the execution; and said that this case was not proper for trover, but for trespass.

Ch. Just. I thought at the trial, that the execution being executed, and lodged in the hands of

the sheriff's officer, it was unlawfully executed, being of the goods of a bankrupt, after the time of his becoming so. I thought too, that as it appeared these goods were in the hands of a tortious taker, there was no occasion to prove an express demand; and that to prove the possession in the defendant, there was no occasion to prove an actual possession in him; for that the possession of the officer, is, in this case, the possession of the defendant himself: for if my agent, by my order, receives a thing, and converts it; trover will lie against me for it. And here the plaintiff in the execution (the now defendant) has given the sheriff a bond to indemnify him from the execution, and has received £300. of the money levied; and trover is the general action brought in this case, and not trespass; and it is generally brought against the officer and plaintiff in the execution; but if this law was to prevail, the plaintiff must always be acquitted; and the reason joining the officer with the plaintiff is, because in many cases, the assignees can't prove an express direction from the plaintiff for the execution; and therefore they bring their action against both, that they may be sure of them: and all declarations in this action, by the assignees of bankrupts, declare on their own property: and it can't be otherwise; for by relation, the property of the bankrupt's estate is vested in them, against all common persons, from the time of the bankruptcy. Upon these reasons, I directed the jury, to find for the plaintiffs as to the goods and chattles; and for the defendant as to the money; for I thought that this action would not lie for it: and notwithstanding [132] what has been said, I see no reason to alter my opinion, as to any part. And the assignees can't maintain an action in this case, for money had; for then,

they by their action would confirm the taking to be lawful.

*Page, Just.* The taking of the goods by the officer, by the command of the now defendant, is a taking by himself: and I think that the defendant's giving a bond of indemnification to the sheriff, and receiving part of the money levied, is a sufficient evidence to prove that the goods were taken by his command. And as to the rest, he was of the same opinion with the Ch. Just.

*Probyn, Just.* Where there is a tortious taking, 'tis sufficient to support an action of trover, without any demand proved, or any matter of conversion shewn. And by the case of *Brassey and Dawson* [see p. 65. 2nd Ed]. it is adjudged, that by relation, the property of the bankrupt's goods vests in the assignees from the time of the bankruptcy. As to the rest, he spoke to the same effect with the Ch. Just. And *Lee Just.* likewise was of the same opinion *in omnibus*. Upon which the court denied to grant a new trial.

### Dibbin v. Coke & al.

**A**N action on the case was brought against the defendants, a master and servant, for stopping up a way. The servant let judgment go against him by default, and the master pleaded not guilty; and verdict was given for him. And *Gapper* now moved, that the master, in this case, might have his costs on the statute 8 and 9 *Will. 3. c. 11. s. 1.* where it is said, that if several persons be made defendants to any action, plaint of trespass, assault, or false imprisonment, or ejectment; and any one or more of them shall be acquitted by verdict; every person so acquitted, shall have his costs, &c. cited *Stat. 23 H. 8.*

If an action on the case be brought against two, and one acquitted, he shall not have his costs on the statute 8 and 9 *Will. 3.* for the word *trespass* in that statute does not mean trespass on the case, but trespass *vi et armis*.

*c. 15. and 4 Jac. c. 3. 1 Lev. 63. and Langdon v. Vinicombe & al. Cooke G. Rep. 107. & Prac. Reg. 102. Trin. 7. and 8 Geo. 2. in C. B. which was an action on the case, upon several promises; and upon not guilty pleaded, some were found guilty, and others not. And after argument, that court held that the defendants who were found not guilty, should have their costs. Hob. 180.*

*Mr. serjeant Draper cited Salk. 194. and Salk. 205. to shew that the statutes which gave costs, are to be taken strictly, and 2 Rolls Rep. 140.*

*Ch. Just. I don't understand the books which say the giving of costs is a kind of penalty; for I think 'tis to be considered as a satisfaction to the party. This statute W. 3. is a new enacting clause, and introductory of a new law. In the statute of 4 Jac. 1. c. 3. there is mention made of all actions whatsoever, in which the plaintiff shall recover costs. The sole question here is, whether the words action or plaint of trespass, shall be construed to extend to actions on the case; and the court ordered it to stand over, and said the cases cited were little or nothing to the purpose. [133]*

*For the remainder of this case, see table of the names of the cases.*

*Rex v. Lloyd. See page 84—88.*

[2nd Ed.]

**L**ORD *Hardwicke* now delivered the opinion of the court in this manner. The justices of peace have, in this case, in the very strongest manner, followed the very words of the statute 1 *W. and M. c. 21. s. 6.* and then they say, that they do find, adjudge, and declare, that the defendant hath been, and is, guilty of the premisses, &c.

To this resolution against him, three exceptions were at first taken; but two of them having been given up on the first argument, as being of no weight, the only exception on which the last argument was founded, was, that the justices of peace have not set out in the order, by which they removed the defendant from the office of clerk of the peace of *Cardigan*, the evidence on which they found him guilty; and therefore his counsel in arguing for him, said, that this was a conviction, and not an order; for that it was attended with the penalty of the loss of his freehold. And in case this is a conviction, there is no doubt but that the justices of peace ought to have set out the evidence; for that point is now well established. And the case in *Salk*. 369. where the contrary is adjudged, has been held not to be law.

So the first question here is, whether this be a conviction or an order. Secondly, If it be an order, whether there be any difference between an order of this nature, and a conviction.

We are all of opinion that this is an order of the quarter sessions, and not a conviction. The statute 1 *W. and M. c.* 21. *f.* 6. says, that if the clerk of the peace misdemean himself in the execution of his office, and a complaint, and charge, in writing, of such misdemeanor, shall be exhibited against him to the justices of peace, in their general quarter sessions; it shall be lawful for the said justices, or the major part of them, upon examination, and due proof thereof, openly, in their general quarter sessions, to suspend, or discharge, him from the said office. I can find but four cases since the making of this act, where there have been prosecutions on it. The first case was *Reg and Baynes*, *Salk*. 680. which underwent a strict examination, and was quashed for the manner of setting out the charge.



The next was *Rex* and *Horwell* cited *Stran.* 998. *Pafch.* 1 *Geo.* 1. which was never determined. The third was *Rex* and *Harland*, *Mich.* 3 *Geo.* 1. which was quashed in *Michaelmas Term* following, because the names of the justices of peace were not set forth, in the caption of the order; and the fourth is this present case. In all these cases, the *certioraries* which were granted, were to remove all orders, &c. not mentioning the word *conviction*; whereas if these orders were taken to be convictions, it would be a sufficient reason to quash them, which has not been done. Besides, in these cases all the returns have been in *English*, and not in *Latin*; which before the late act, (which turns all law proceedings into *English*) would have been a fatal exception. I have all the arguments of the case of *Reg* and *Baynes*; and there, even *Holt*, who argued against the charge, treated it as an order of sessions, and not a conviction; and that point was then directly under their consideration. But it was objected, that though this might bear the name of an order, yet that it was of the nature of a conviction; for that by this the defendant loses his freehold. And it must be allowed that the objection does carry some reason with it; and, if a *res integra*, might possibly be thought to be so. But this objection presumes too much; for then every act of the justices of peace, by which a man is convicted of an offence, attended with a penalty, must be taken to be a conviction; whereas the statute 18 *Eliz.* c. 3. and several other statutes, inflict penalties on the parties convicted, and yet the acts of the justices of peace, upon these convictions, have been always considered as orders, and not convictions: therefore it must be allowed that the distinction between orders and convictions are very nice. And this court seems to have founded the distinction be-

tween orders and convictions, rather upon the manner of penning the several statutes which give jurisdiction to the justices of the peace, than upon the nature of the penalty, which they inflict; and if we should determine this to be a conviction, we should go contrary to the opinion of those who have been before us. So the next question is, whether there is any difference between convictions and orders, as to the setting out the evidence; and we think that doctrine is so well settled, that we cannot break through it. The statute 18 *Eliz. c. 3.* gives power to justices of peace, out of sessions, over the reputed fathers of bastard children. And statute 3 *Car. 1 c. 4. s. 15.* gives the same jurisdiction to the sessions. And in *Mich. 4 Geo. 1. No. 6.* in the *Crown Office*, is the case of *Rex* and *Blackwell*, which was an order of sessions on the reputed father of a bastard child, which was penned in the very words of the statute, and neither the evidence, nor the summons, was set out. And Mr. Justice *Page*, being then of counsel for the defendant, excepted to the order, upon the generality of the words, *upon the examination of the cause and circumstances, &c.* and likewise, because there was no summons set out: and the court overruled the exception; for they said, that this being an order, they would presume the justices did right, till the contrary appeared. The words of this statute, 1 *W. and M. c. 21.* are the very same with the words in the statute 18 *Eliz.* and it has been held sufficient, on proceedings on that statute, to pursue the very words of the act: and the sessions have done this in the present case, in the strongest manner. *Rex* and *Venables*, *Trin. 11 Geo. 1. [Stran. 630. lord Raym. 1405.]* was a case on statute 5 and 6 *Edw. 6. c. 25.* for keeping a disorderly ale-house; and the party was ordered to be committed to prison for three days, and

[135]

till he should find security, &c. and there was no summons set out; nor did it ever appear, that the man was heard to answer for himself; and this point was strongly argued; and yet the court was unanimous in their opinion, that this being an order of justices, and not a conviction, it was not necessary to set out a summons, for that they would presume that the justices had done right: but it afterwards appearing to the court, that, in fact, the party was neither summoned nor heard, they granted an information against the justice, who made the order.

In this case, indeed, the want of a summons is not objected to, but want of the setting out the evidence, by which the defendant was found guilty. But the cases which are cited, are stronger than the present case; for summons concerns natural justice itself; whereas the want of setting out the evidence, can be but a defect in the form and manner of proceeding. *Mich. 5 Geo. 2. Rex and Theed* [*Stran.* 919. lord *Raym.* 1375.]

It has been said for the defendant, that it is contrary to the general rule of law, to excuse the want of setting out the evidence, whenever there is a summary way of proceeding, without a jury; for that, in such cases, the evidence is always set out. And it was compared to the proceedings in dower, and demurrer to evidence. But there is a great difference between them cases, and this: for error lies on the judgment given in such actions: and if the evidence was not set out, the superior courts would have nothing whereon to judge of the damages in the one, or the validity of the evidence in the other. But in this case, here lies no appeal from the facts; for the sessions are the final judges in this case; and therefore when these orders are removed up here, we com-

monly judge of the law arising on the order itself. It is objected that this order is attended with the penalty of the loss of a freehold; and therefore, as the penalty is great, the evidence ought to be set out. But in the cases which have been mentioned of bastardy, keeping disorderly houses, &c. the penalties cannot be said to be small, and yet it is not required in these cases. The last objection which has been made is, that it has never been determined, that it is not necessary to set out the evidence in this case. And it is true, that it never has been determined; but the law does not consist of particular instances only; but in the reason which runs through and governs those cases, which have been determined. In the case of *Rex* and *Horwell*, this point did come before the court, though it was not determined. And the case of *Queen* and *Baynes*, is as good a negative authority as can be; for though that case was so much sifted, yet this objection was never taken. [136] But the foundation on which we have formed this judgment is, that this is an order, not a conviction; and therefore it must be governed by the same rules, by which other orders have been. I own that, for my own part, I was for a long time doubtful; and was, at last, determined, by this distinction, which has been so long established. Wherefore we are all of opinion, that this order must be affirmed.

N. B. That in about four days after the Ch. Just. had delivered the opinion of the court, in this case, he informed the bar, that he had been mistaken in stating the case of *Rex* and *Theed*; for that he had ordered the rules to be searched, and found it was considered by the court, as a conviction; and was quashed; because the sessions had not set out the evidence on which they

23. *Mem. Term 8 Ges. 2. B. R.*  
 certified him: and therefore that case no way  
 supported the supposition given in the case of *The*  
*King against Lord*, that being upon an order.  
 Strass. 1000. S. C.  
 Defendant

James T. Palmer. Str. 1000. S. C.

**Jamieson v. Palmer.** Strass. 1000.  
An action was brought against the defendant as acceptor of an inland bill of exchange; upon the trial before Lord Hardwick, at Guildhall, it appeared from the evidence, that the acceptance was made upon the plaintiff's bill, which was due to the defendant, whether or not a verbal acceptance of an inland bill of exchange, is sufficient to warrant an action against the acceptor, upon the Statute 1 and 13 W. 3 c. 17. and 3 and 4 Geo. 4. c. 96. for the plaintiff, argued, that the judges have considered actions on bills of exchange, in favour of merchants and trade. His, Ch. Just. said he re-considered the first action brought on a bill of exchange, in that case. Treby, Ch. Just. said, that bills of exchange were first allowed between English merchants and foreigners; next, among English merchants themselves; among all persons whatsoever, a Vent. act 1717. amongst all persons who draw a bill of ex- change, and therefore if a gentleman draws a bill of ex- change, he is a merchant to that purpose. The last act respecting inland bills of exchange, that he should make no distinction in that part is good. Wigglesworth v. Brown. 2 Strass. 114. Privy. Council. Acceptance by a stranger

[137] is good, so as to bind the stranger for the honour of the drawer. *Carth. 459.* Acceptance after time of payment is elapsed, is good. *Salk. 129.* Tho' the act 3 and 4 *Ann. c. 9. s. 5.* provides, that no acceptance of an inland bill of exchange, shall charge any person whatsoever, unless underwritten, or indorsed; yet the last clause in the act sets all at large again, which is a proviso, that nothing contained in this act shall discharge any remedy, which any person may have against the drawer, acceptor, or indorser, of any such bill. Therefore, as these acts have made no alteration, as to this point, it is to be seen what was the custom of merchants before those statutes, and what it is now. In *Molloy 295*, and *300*, and *Ed. 9. Vol. 2. p. 100.* It is said, that an acceptance binds without writing, and that a small matter amounts to an acceptance, so as there be an understanding between the parties; that if it is said, *leave your bill with me, and I will accept it*, that is a good acceptance. *Mich. 12 Geo. 1. Wilkinfon and Lutwidge [Stran. 648.]* at *Nisi Prius* before lord *Raymond*, action on a foreign bill of exchange, against the defendant, as acceptor. On the evidence, it appeared, that the defendant in a letter said, *I will pay it, if you'll let me first send to my correspondent in Ireland.* It was insisted upon by the defendant, that this was only a conditional promise of acceptance, but the Ch. Just. held it a good acceptance. *Mich. 6 Geo. 2. Cox and Coleman cited 4 Vin. Ab. 250. pl. 12.*; a foreign bill of exchange was drawn upon the defendant and returned, and protested for non-acceptance, and afterwards the defendant said to the plaintiff, *if the bill comes back I will pay it*; and this was held a good acceptance. There never was any difference between foreign and inland bills of exchange; as to the matter of accept-

convicted him ; and therefore that case no way impeached the resolution given in the case of *The King against Lloyd*, that being upon an order.

*Lumley v. Palmer. Stran. 1000. S. C.*

Parol acceptance is sufficient in action against the acceptor of a bill of exchange.

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Mr. *Abney*, for the plaintiff, argued, that the judges have extended actions on bills of exchange, in favour of merchants and trade. *Holt*, Ch. Just. said he remembered the first action brought on a bill of exchange, 2 *Lut.* 1585. In that case, *Treby*, Ch. Just. said, that bills of exchange were first allowed between *English* and foreign merchants ; next, among *English* merchants ; afterwards, among all traders in general : and lastly, amongst all persons whatsoever, 2 *Vent.* 292. and therefore if a gentleman draws a bill of exchange, he is a merchant to that purpose.

The two acts concerning inland bills of exchange, are made for the benefit of the drawer, that he should not be chargeable for interest and costs, without a profit. *Salk.* 131. Acceptance for part is good. *Wegerhoffe* and *Keene*, *Mich. 6 Geo. 1. Stran. 214. Petit v. Benson. Comb. 452.* these resolutions seem to be founded on *Molloy*, who says the same. Acceptance by a stranger

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ance, by common law nor by statute; but only in matter of protests, they differ at common law.

Mr. *Strange*, on the same side, argued, that there is no doubt, that before 9 and 10 *W. 3.* a parol acceptance was good, as appears by *Molloy*. The alteration which that act has made, as to these bills of exchange, is, that it makes an underwritten acceptance necessary, to warrant a process of non-payment, so as to charge the drawer for principal, interest, and charges; but the act does not say, that an acceptance, though not in writing, shall not be sufficient to any other purpose than that particular one there mentioned. This act of 9 and 10 *Will. 3.* does not extend to protests of non-acceptance, and therefore, in order to elude this act, it was customary with merchants to refuse to accept; and therefore to supply this defect, was statute 3 and 4 *Ann.* made, which gives a protest for non-acceptance, and then provides that no acceptance shall charge the drawer with interest and costs, on a protest for non-payment, unless it be under-written, or indorsed; and this is all the innovation that is made by the statute; but there is nothing in it concerning an action against the acceptor; but it is made merely for the benefit of the drawer, that he should not be charged with interest and costs, upon a parol acceptance. *Salk. 131. 6 Mod. 81.* This appears by the last provision of the act, which is, that nothing contained in the act shall discharge any remedy which any person may have [138] against any drawer, acceptor, or indorser. Now the plaintiff had, by the common law, a remedy to charge the acceptor for the principal, and that still remains. And this has been the constant course of the city of London, ever since this act, as well as before. *Scot and Anderson, Mich. 1 Geo. 2.* a parol acceptance of

an inland bill of exchange, was held good by *Raymond Ch. Just. at Nisi Prius, London.*

*Mr. Marjib, contra*, argued, that as many inconveniences arose from a slight acceptance of an inland bill of exchange, the design of the above-mentioned acts was, that an acceptor should be made liable by his solemn act of under-writing, or indorsing. In the act of queen *Anne* are these general words, "*that no acceptance shall be sufficient to charge any person whatsoever, except under-written or endorsed.*" And there can be no custom of merchants, as to the inland bills of exchange, since *Holt. Ch. Just.* said he remembered the first action ever brought on them. And as to foreign bills, in *Lutw. 887.* is a declaration on a foreign bill; and when it comes to an averment of the fact, it is particularly said, *acceptavit & manu sua subscripsit.* In the case of *Rex and Maggott*, at *Nisi Prius in London, Hill. 7 Geo. 2. C. B.* it was ruled by *Eyre, Ch. Just.* that a parol acceptance of an inland bill, was not sufficient to charge the acceptor.

*Mr. Abney*, in reply, said, that according to *Molloy*, and the two cases before cited, a parol acceptance is sufficient on foreign bills of exchange.

*Hardwicke, Ch. Just.* said, that at the trial of the cause, he was of opinion, that the action might be maintained against the acceptor on a parol acceptance; but that he had saved the point, as it depended upon the penning of two acts, both very dark, but more especially the last: and as it was said to have been otherwise determined by *Eyre, Ch. Just.* but that he was now confirmed in his opinion, and that the true construction of these acts is to charge the drawer with principal and interest, after the protest, which will appear by considering the purport and intention



of them: that it had been truly said, that before these acts, there was no difference between foreign and inland bills of exchange, but in case of protests, for at common law there was no way to charge the drawer of an inland bill, with interest and costs, after a protest; and therefore the first act was made, that after acceptance by under-writing, the bills might be protested for non-payment, and that thereon interest and charges should be paid by the drawer, from the time of the protest. The statute does not say the original sum, for that is recoverable without protest, but interest and charges. Then was made the act of queen *Anne*, which recites this clause in the act of *K. W.* and the mischief to be remedied, is said to be, that there was no provision by the first act for interest and charges, in case any merchant refused to accept the bill by under-writing, or indorsing, and this act [139] makes a new provision and enables them to protest for non-acceptance, so that the whole provision of the two acts plainly relates to protests, the first giving a remedy upon protests for non-payment, and the second upon protests for non-acceptance. Indeed the fifth section has express words, that no acceptance shall charge any person whatsoever, unless under-written or indorsed, and if these words stood singly, it would be hard to say, that any remedy lay against the acceptor, by reason of a parol acceptance; but then the generality of these words is restrained by the words that immediately follow, that if such bill be not accepted by such underwriting or indorsement, no drawer shall be liable to pay costs, damages or interest thereon. So that the first general words are only to be considered to relate to the charging the drawer with interest and costs. Nothing is more common than for an act of parliament to have general

words at first, which are afterwards restrained by particular ones.

The proviso at the end of the act is also very material to the present point, that nothing in the act contained shall discharge any remedy against the drawer, acceptor or indorser of any such bill. The construction of this clause is, that it relates to the remedy for the principal sum in the bill; for these two acts relate to, and make a provision for protests, which are to be followed with interest, damages and charges upon the drawer; and therefore this is a natural proviso, that this should not extend to discharge any remedy that they might have for the principal sum, tho' there were no such protest. The cases of foreign bills of exchange are not much to this purpose, since the present question wholly turns upon the act of parliament. The case of *Scott and Anderson* is indeed in point, and that seems to have been the opinion of lord *Raymond*, at the latter end of his time. Lord *Parker* was likewise of the same opinion. *Holdsworth* and *Thicary*, *Pasc. 11 Ann. B. R.* an action on the case on an inland bill of exchange against the acceptor; at the trial exception was taken that the acceptance was only by parol. But *Parker*, Ch. Just. held, that it was sufficient; for that the act only extended to the loss of interest and damages by reason of not accepting by underwriting, but not to the principal sum on the bill. *Smith* and *Plunket*, *Mich. 11 Ann. in B. R.* the same determination on the same objection.

His lordship added, that this point did not seem to be so settled to the contrary in *C. B.* as had been maintained at the bar, for that he had been informed by one of the judges of that court, of a late case which came before them: *Orm* and *Holiday*. *Hil. 3*

*Geo. 2.* an action on the case against the acceptor of a bill of exchange, exception was made at the first trial, that the acceptance was not made in writing; and therefore not binding. It was moved in court; and they being informed that the opinion of lord *Raymond* was, as before cited, all inclined to the same opinion; indeed no final judgment was given, because the defendant thought fit to acquiesce in the [140] inclination of the court, and never moved it again.

*The new trial was denied per tot. Cur.*

*Rex v. Reading. Ca. temp. Hard. 79. S.C.*

Wife not good evidence to bastardise her child; and in what case the wife shall be good evidence against her husband.

**M**R. serjeant *Wright* moved to quash an order of two justices and two orders of sessions made thereon, whereby the defendant was adjudged father of a bastard child.

The first order of sessions was a special order, setting forth the particular circumstances of the case, and charging the defendant upon the oath of a *feme covert*, with getting a bastard upon her. This order adjourned the matter to take the advice of the judges of assize; but they declined giving their opinion in it, and the second order resumes the affair and adjudges the defendant to be the father of the child. There were other witnesses, who said, that the husband was a resident about seven miles from the wife's habitation. Exception was taken, that the wife is the only evidence; and that she is not a competent witness in law to exonerate her husband of the charge and burden of this child.

Mr. *Abney*, for the orders, argued, that if the orders of sessions on which the fact is stated specially, should be bad, yet the order of two justices is general and

good, and therefore, tho' the orders should be quashed, yet this will stand. As to the objection that the wife is not a good evidence in law to prove the defendant father of the child. *The inhabitants of St. Andrew's, Holborn, and of St. Bride's, Fleet-Street. Pasc. 3 Geo. 1. [Stran. 51.]* An order of settlement was removed into this court, setting out a special case, that *T. P. and E.* had been married 23 years, and had 4 children, two of which were dead, and two had gained settlements. Both the husband and wife were married to other persons by their mutual consent 18 years before this dispute arose. The wife, after her separation from her husband had 8 children, which appeared upon the examination and evidence of the wife. And *Parker, Ch. Just.* was of opinion, that the wife was a good evidence, to prove that the children did not belong to her husband, but to the other person, as they were poor persons, and therefore the child is entitled to a settlement and maintenance somewhere, and it must be indifferent to the parent where, and the woman could have no interest in fixing them upon the other person. The case of *Pendrell and Pendrell, Hil. 5 Geo. 2. [Stran. 925.]* was an issue directed out of chancery, to try whether the defendant was legitimate or not. On the trial before *Raymond, Ch. Just.* the declarations of the mother were given in evidence to prove the child a bastard. *Hil. 3 Geo. 2. Clark and Wright in C. B.* on an issue out of chancery to try the legitimacy of the defendant, the frequent declarations of the mother, that the child was not her husband's, were offered, but, because the mother was alive, not admitted; but *Eyre, Ch. Just.* said, that had she herself been there, she might have been examined.

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Mr. *Parker*, on the same side, argued, that if the

orders of sessions are bad, yet the order of two justices will stand, for the court will take no consideration of any thing set out upon a bad order, as they take notice of nothing set out in a plea that is bad in any particular; as the first order of sessions makes no determination, but only refers the matter, it is bad. *Salk.* 486. And that no adjournment appearing upon the face of the first order, the second order was wholly superfluous. In the case of *Shrewsbury, Pasc. 7 Geo. 2. 2 Stran.* 975. a rate was made for the relief of the poor. An appeal against that rate to the sessions, the sessions adjourning the matter of the appeal from the 19th of the month to the 20th, but as it did not appear upon the face of the order, that they likewise adjourned the court till that time, this court were inclined to think it bad, till it was set right by another *certiorari*, which returned an adjournment of the court. And the notion of the husband being within the four seas has been long exploded.

Mr. serjeant *Wright* and Mr. *Strange* in reply; As to the point, chiefly insisted upon, that the orders of sessions are bad because there is no adjournment, argued that, it must be allowed, that if an adjournment did not appear upon the face of the order, any act done at an adjourned session would not be good; neither is the first to be called an order, for the matter is by that only referred, in order to take the advice of the judges of assize. The court of sessions are not bound to determine this appeal at the first session, but they may at any time put it off, in order to hear more evidence, or take the advice of the judges, or for any other cause. As to the merits of the case, it is held 1 *Inst.* 6 b. that a wife cannot be an evidence for or against her husband, as it might be a means of great inconvenience and cause of implacable discord

and diffention between the husband and wife; and there can be no case, in which the wife's giving evidence, is likely to create so much diffention between her and her husband, as the present. And formerly, justices of the peace thought they had nothing to do with the children of married women.

*Hardwicke*, Ch. Just. There are in the present case two questions, one upon the form of the order, and the other upon the merits. The objection to the form is, that the first order of sessions makes no determination, and that the second order is wholly superfluous, as there appears no adjournment upon the first, so that the sessions could resume the consideration of the cause. Where an appeal is lodged in the sessions, it is necessary that they make a direct and final judgment, and cannot refer it to the judges of assize for their judgment. *Salk.* 486. and therefore had the matter rested upon the first order, it would 142] undoubtedly have been bad; but then it cannot be doubted but that they may continue over the determination on the appeal, By a proper judgment, either to take the advice of the judges, or for any other reason. The matter, therefore, rests upon this, that here is, upon the first order, a reference to the judges of assize for their advice, and no formal adjournment after it. It does not seem that there ever was any determination in this court, that it is necessary for the justices, in their quarter sessions, in the execution of any jurisdiction given by statute, to make formal and regular continuances, as the courts above do. It must, indeed, be agreed, that upon indictments where they proceed as a court of record at common law, they must make regular continuances, but it seems that, upon orders, no such formal adjournment is necessary, and the matter sufficiently imports, that

there was, in fact, an adjournment in the present case, by referring it to the judges for their advice, when they should come the circuit. Then the question will arise, whether the last orders being adjudged bad upon the merits of the first order, can be abstracted from that and made good. It has always been taken as a rule, that where there is a general order of two justices, good upon the face of it, and the party appeals from it to the sessions, and they make an order specially stating the case, as it appears upon the evidence before them, the court will take the special case in the last order, to be the foundation upon which the first order by two justices was made, and therefore, if the evidence set out upon the last order, is not sufficient to maintain their judgment thereon, the court will not only quash the last, but the first order likewise.

It has been said, that if the orders of sessions should be bad upon any account, the court will not take notice of any thing appearing upon them. But though this is the rule of pleading, yet it does not hold in orders; for in orders of settlement, where, on appeal from two justices, the sessions state the case specially, and conclude with quashing the order of the two justices; this court will sometimes make use of the fact, appearing upon the last order, to quash it, and consequently to affirm the order of the two justices.

Then, as to the merits, the wife is not a competent evidence in point of law, in this case, that is, to prove the whole fact; though it seems she may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with so much secrecy, that it will admit of no other evidence: therefore, as to the fact of the defendant's conversation with her, she may be a good witness;

but this is only from the necessity of the thing; but then in the present case, it is gone further; for the wife is the only evidence to prove the want of access of her husband; whereas this might be made appear by other witnesses, and therefore the wife shall not be admitted to prove it, since there is no necessity that can justify her being an evidence in this case. [143]

In the case of *Pendrell*, before cited, there was the strongest evidence imaginable, to prove the want of access to the husband. It was made appear by several of the husband's relations, who watched him for that purpose, that he was in *Staffordshire*, all the time his wife went with child, and she resided in *London* the whole time. It must be of very dangerous consequence to lay it down in general, that a wife should be a sufficient sole witness to bastardize her child, and to discharge the husband of the burthen of his maintainance.

But the opinion the court is of at present, will not be a precedent to determine any other case wherein there are other sufficient witnesses, as to the want of access, but the foundation that is now gone upon, is the wife's being the sole witness.

*Page*, Just. This is something similar to the cases of hue and cry, where, by statute in action against the hundred, the person robbed is admitted an evidence from the necessity of the thing; as to those matters which generally can be proved by none but himself, as that he is robbed, and of what sum, and in what place; but of all other things, which may possibly be proved, as well as by other evidence, he is no witness in law, nor does the statute extend to it, as whether the place is within the hundred, &c.

*Probyn*, Just. In cases of violence, committed by the husband against the wife, she herself is admitted an evidence, as in the case of Lord *Audley*, *Hut.* 115.



and in the cases of exhibiting articles of the peace, from the necessity of the thing, since it may be done at a time when no one else can prove or know it.

*Lee, Just.* In the case in *Salk. 122. Reg. v. Murrey*, where a child born in lawful wedlock was proved to be a bastard, no such exception was taken as in the present case, but the defendant merely insisted upon the old notion of the husband's being within the four seas.

On the statute 3 *H. 7. c. 2.* in the case of *Ramsay*, on an indictment, for forcibly taking away a woman, and marrying her, the wife was admitted an evidence, because no other person, except the defendant, was present; and therefore it is very proper to admit this woman, to prove what was done in secret, and what, it cannot be presumed, there are other witnesses to prove; but then it must be admitted no further than necessity warrants; and in all other cases, the rule of law is to be adhered to. But I am doubtful, as to the order of sessions being good in form; for the words of the act 18 *Eliz. c. 3.* seem to confine that to the next sessions; and if they then and there do nothing, then the act of the two justices is to stand.

At length the court ordered it to stand over, as to this single point, of which Mr. Just. *Lee* doubted.

*For the remainder of this case, see table of the names of the cases.*

This case is not continued in *Cunningham*. From a note at the commencement of the 2nd edition, it will be observed, that it was intended to publish a second part of these Reports, but this, it seems, was never done.

The remainder of this case is, however, reported in 2 Sessions Cases, No. 175, from which the following extract is taken. "In Hilary Term following (*i. e.* Hil. 8 Geo. 2.) Order of Sessions was quashed; because not properly adjourned, as was likewise the order of two Justices, by consent of Counsel, and Defendant entered into Recognizance to appear at Sessions, and abide such new Order as the Justices should make on him."

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HILARY TERM

8 GEORGII 2. IN B. R.

Boucher v. Lawfon. Ca. temp.  
Hardw. 85. S.C.

**A**N action on the case, being brought against the defendant, for that the plaintiff delivered a parcel of goods into a ship, whereof the defendant was owner, bound from the river *Tagus* to *London*, where the goods were to be delivered, and that the defendant undertook to carry the goods, and deliver them at *London*, to the plaintiff. The plaintiff averred, that the ship did arrive at *London*, and that the defendant refused to deliver the goods to him. The defendant pleaded not guilty, on a trial at *Guildhall*, before lord *Hardwicke*; and a special verdict was found as follows;

How far owners of ships are liable for default of the masters, at common law.

That the defendant was sole owner of the ship; that he appointed one *Fletcher* master of it; that the plaintiff put the goods on board this ship, to be carried from the river *Tagus* to *London*; where the plaintiff was to pay so much freight for the goods, and that the goods were to be delivered at the port of *London*, on the ninth of *August*, damages of the sea excepted; which bill of lading was signed by the master, and found in *hæc verba*.

They further find, that the ship did arrive safe at *London*; that the plaintiff has made no assignment of the goods; that in *September* the plaintiff made a demand of them, and that the defendant refused to

deliver them ; and that the plaintiff was ready to pay the defendant his freight. They further find that the goods were *Portugal* gold, and that to export it is an unlawful trade, according to the laws of *Portugal*. They lastly find it to be usual, when any gold is exported from *Portugal* to this kingdom, for the master of the vessel to take the whole freight to his own use, without accounting for any part of it to his owners, unless there be some special agreement between them to the contrary, and that in the present case, there was no such special agreement.

Mr. Serj. *Darnel*, for the plaintiff, argued, that this [145] does not differ from the common case of owners of ships, who, in like manner, as carriers, are liable for the master's neglect, in respect of freight. *Mors* and *Sluce*, 1 *Mod.* 85. 2 *Lev.* 69. 258. 1 *Vent.* 190 and 238. An action against the master of a ship for damage the plaintiff had received by his negligence. It was strongly insisted upon, that the action did not lie against the master, but should have been brought against the owners themselves ; but the court held, action lay either against the owner, or master ; for that they were both intitled to an action for the freight. The defendant, in this case pleaded, that eleven armed men came on board him under pretence of pressing, and took away the gold, but this defence was not allowed of ; the court comparing this to the case of a common carrier. *Boson* and *Sandford*, *Carth.* 58. *Salk.* 440. 2 *Lev.* 258. *Comb.* 116. 1 *Show.* 29. An action against the owners, and adjudged that the action did lie against the owner, or master, for default of the master ; for either of them may bring an action for the freight. *Brandon* and *Peacock*, at the sittings after *Easter Term*, 1730, 3 *Geo.* 2. at *Guildhall*, before *Raymond*, Ch. Just. a person put tobacco on board a

ship; the master run away with the ship and tobacco; the goods being insured, the person that owned the tobacco, applied to the *Insurance-Office*, and received the value of it. The *Insurance-Office* took an authority from him to sue the owner, and the Ch. Just. held that the action lay. This has been likewise the practice in *Chancery*. 2 *Vern.* 442. 443. A man had undertaken to carry goods in a lighter, and the lighter was overfet, and the goods damaged; and a bill was exhibited to discover the owners.

Mr. *Abney*, for the defendant, argued, that without impeaching any of the other cases, the present may be distinguished from them. The verdict has found, among other things, that this trade of exporting gold is an illicit trade, according to the laws of the kingdom of *Portugal*; and in this particular trade, it is usual for the masters to take the whole freight to their own use, without there is some special agreement to the contrary, and that here there is no such agreement. *Mich.* 13 *Geo.* 1. in *Canc. Burrows, v. Femino* [*Stran.* 733.] A suit was commenced at *Leghorn*, about the acceptance of a bill of exchange drawn there, and the judges of the court there were of opinion, that the acceptance was not sufficient. The parties afterwards happening to come into *England*, the plaintiff brought his action here; but the defendant, in whose favour the judgment at *Leghorn* was, brought his bill in *Chancery*; and *King*, lord chancellor, was of opinion, that the court of *Leghorn*, having a general and proper jurisdiction of the cause, their judgment was binding and conclusive to the court here, and thereupon granted a perpetual injunction. His lordship cited a very remarkable case, 3 *Keble* 785. *pl.* 34. and cited, 1 *Shrw.* 6. of a person  
[146] tried in *Portugal*, for murder, and acquitted; who

coming into *England*, was afterwards arraigned at the *Old Bailey*, according to the statute 35 *Hen. 8. c. 2.* but pleaded his former acquittal, and it was allowed. If therefore, courts here will take notice of the particular determinations of the courts abroad, they will certainly have regard to the general law of a country, declaring any thing an unlawful trade, and not give any countenance to actions brought upon such illicit commerce. The owner of a ship is to be considered as a general master, and the master as his servant. A master is not answerable for the acts of his servant, but where he acts in execution of any authority given him by the master. *Salk. 282. Skin. 625.*

If a servant abuses a distrefs, he only is answerable. *Hard. 31.* my servant sells false stuff, without my commandment; no action lies against me: otherwise, if by my commandment. In the present case, there is no privity between the plaintiff and the defendant. The defendant is wholly a stranger to the bill of lading, which is made between the plaintiff and the master; and the freight, as is found by the verdict, is the master's, and not the owner's.

The usage and custom of merchants, which is part of the general law of *England*, and ought to be taken notice of by the courts of justice, is, that in this case, the master of the ship is intitled to the whole freight, and the owners to no part of it. The reason the court went upon, in the case of *Boson and Sandford*, and the other cases cited, was, that the defendants were common carriers of goods for hire, and were intitled to the freight. It is said there, that the action certainly lies against them, as they have all the profits, and all the recompence; which is otherwise in the present case, neither are these cases of an unlawful trade. As hire is the ground of the action on the custom against com-

mon carriers, so is freight against the owners of ships; the undertaking is not the undertaking of the owners, but of the master. If the servant of a carrier carry goods without the privity of his master or his receiving a reward for taking them, the master is not chargeable. *Middleton and Fowler, Salk. 282.* to the same purpose. *Pate and West, Trin. 5 Geo. 2.* An action against the *Hampstead* stage coach-man, for a shirt that was lost.

*Raym. Ch. Just.* held, that a servant, by taking the profits, or by a special undertaking, was liable, but that the master was not answerable, where he did not receive the profits, or by a special undertaking was liable; but that the master was not answerable, where he did not receive the profits.

Mr. Serj. *Darnel*, in reply, argued, that this cannot be distinguished from the case of *Boson* and *Sandford*; for the very bill of lading gives the owners an action for the freight; and as this is an unlawful trade in the kingdom of *Portugal*, it can have no relation to the contract between the owner and the merchant. If a man steals goods, and puts them on board [147] a vessel, there is no doubt but the owner would be intitled to freight. As to the master not being liable for his servant, but in the exercise of his trade, this is in the master's trade, for it is the trade of owners of ships to carry goods. If a servant nails a horse, the master is liable; a delivery to a servant in the way his master employs him, is a delivery to the master.

*Hardwicke, Ch. Just.* This case seemed at the trial, of very great consequence, as it concerns on the one side, one of the most beneficial branches of the English trade, as it relates to the security that persons have in trusting their gold on board English ships; and on the other side, as it concerned the

security of owners of ships that they might not be charged by the default of their masters, further than reason requires. But since by the act of parliament made last sessions, owners of ships are liable for goods taken in by their masters, without their privity, no further than their interest in the ships and in the freight, it is not now of so great consequence ; as the point of law here brought in question, only concerns the parties in this suit, and will not affect any further determinations.

Had this cause been directly within the reason of *Boson* and *Sandford*, or *Moss* and *Sluce*, the special verdict would not have been directed to have been found. These two cases are under the like reason, as is likewise that of *Brandon* and *Peacock*, and therefore must be taken for law, not now to be shaken : that where there is a trading ship concerned in a voyage, it must be considered in the nature of a common carrier ; and the owners are liable for the negligence or fraud of the masters. These cases depend upon two grounds, first, that the owners appoint the masters, and secondly, that the freight comes to the owners. Here it is found by the verdict, that the last of these reasons fails, and therefore it will stand upon this single ground, that the master being the owner's servant, is liable on that account.

The first difference attempted to be made between this case and the other is, that this trade of exporting gold is found to be a trade prohibited by the laws of the kingdom of *Portugal* ; but tho' the trade is found to be there unlawful, yet the verdict has not found the consequences of it, whether it might incur the loss of the ship or a personal penalty on the master only ; and I am not satisfied that this will make any difference. The carrying on, indeed, of a trade, pro-

hibited by the laws of *England*, is of material consequence, and it is said that the parties in that case shall receive no relief, as they are both *participes criminis*, and therefore the law will not give one a remedy against the other. But if it should be laid down as a principle, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action, it would cut off all benefit of such trade from this kingdom, which would [148] be of very bad consequence to the principal and most beneficial branches of our trade, nor does it seem to have been ever admitted.

The reason gone upon by *King*, lord chancellor, in the case of *Burrows* and *Jemino*, was certainly right, that where any court, whether foreign or domestick, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts, but I never was satisfied with the chancellor's opinion in granting an injunction upon it; for if the objection was an objection at common law, therefore the parties should have been dismissed, to have taken advantage of it there. In the time of *Car. 2.* a suit was brought on a contract of marriage; the sentence of the ecclesiastical court at *Turin* was given in evidence, and allowed to be conclusive.

But tho' a determination in a particular case, may be binding here, yet that will not make a general rule, that their laws are conclusive in this kingdom: therefore it does not seem that the unlawfulness of this trade in *Portugal*, since it is lawful in *England*, will have any effect on the determination of this case.

The next distinction made is, that it is found to be usual where any gold is exported from *Portugal* to *London*, that the master should take the freight to



his own use, without accounting for it to his owners, unless there is some special agreement between them to the contrary. This point, if any, will make the material difference, but it wants to be a little more cleared up.

The bill of lading is found by the verdict in *hæc verba*, and in it are these words, *to pay freight for the said goods*. Now freight being the fruit and earnings of the ship, by the rule of law belongs to the owners, and the master is only intitled to his wages, and therefore had it stood on the bill of lading and nothing else, the court would have taken it, that the freight belonged to the owners. But the question is, whether the subsequent finding this usage will make any difference now; and as to that, the point will be, whether this is to be taken, as a strict custom, or for no more than the common practice, and that the owners only make an allowance to the master of this part of the freight; for that they pay him less wages, or on any other consideration; for then it is only an allowance of part of their profits to the master, and they are notwithstanding liable; and therefore, if this finding of the usage is to be taken consistently with the bill of lading, and the reward for carrying the goods is freight, and consequently by the rules of law, belonging to the masters, they are within the case of *Bojon and Sandford*.

*Page, Just.* As to the finding of a usage, if a common carrier, should allow his driver the carriage of some small things as perquisites, the master would without all doubt, be still liable, and that is only a private agreement between master and servant, and only a different way of paying his servant wages.

*Lee, Just.* Was of opinion, that as the owner is [149] in general intitled to the freight for goods imported,

it seemed not to be a proper consideration for the court, whether he is so in this particular case, but that they must go on the general notion of the law in these kind of implied contracts, on which actions are allowed against carriers and owners of ships. And that as to the trade being prohibited by the laws of *Portugal*, the right of an English subject cannot be altered by the general law of any other country, unless there has been a particular determination in his case.

*Cur.* Ordered it to stand over.\*

Marwood on the demise of Fennel and others  
v. Darrill. Ca. temp. Hard. 91. S.C.

**I**N ejectment a special verdict was found as follows: That *Thomas Darrill*, having one brother and four sisters, and being seised in fee of the lands in question, did by his will bearing date 1703, devise to *E. W.* and *C. W.* all his lands, tenements and hereditaments, to the use of them, their heirs and assigns for ever, in trust to and for the sole benefit and behoof of his first and every other son in tail male, remainder to his brother *Arthur* for life, remainder to his first and every other son in tail male, and for default of such issue, then to the said *E. W.* and *C. W.* he gave all his lands, &c. to have and to hold, to the use of them their heirs and assigns, to and for the only proper use and behoof of the first and eldest son of *John Darrill* of *Colehill*, lawfully begotten or to be begotten, not heir at law or inheritor of the real estate of his father, and to the third, fourth, fifth, and every

Devise to trustees to the use of them and their heirs, in trust for the use of the eldest and first son of *D.* who should not be heir and inheritor of *D.* & to the heirs of his body, and so to every other son of *D.* in like manner. *D.* had 7 sons whom the jury found were all papists, except the youngest, who was an infant: whether

\* For the further report of this case, see Ca. temp. Hard. 194. Judgment for defendant, *Hil.* 9 Geo. 2.

the limitation is not void, for the uncertainty who could take in the life of *D.* and whether by the statute 11 and 12 *W. 3.* any of the children could take who were papists. The court gave no opinion, but inclined that a papist could not take by will; for a devisee takes by purchase.

other son or sons of the said *John Darrill*, and the heirs males of their bodies, so as such son to whom such use is limited, be not heir at law or inheritor of the real estate of the said *John Darrill*; and if the said *John Darrill* should happen to die, leaving but one son, then remainder to the heirs of the body of the testator, remainder to the heirs of the body of his brother *Arthur*, remainder over to his sisters and the heirs of their bodies.

The jury further find the death of *Thomas Darrill* the testator, without issue, and the entry of his brother *Arthur* and his death without issue; then they find the age of the sisters of the said *Thomas*, who are heirs at law to the testator and lessors of the plaintiff in this ejectment. They also find the several marriages of them; then they find that *George Darrill* the defendant is the second son of *John Darrill*, of *Colehill*, and that he was born in the year 1703. And that he has an elder brother *Philip Darrill*, now living, and that the said *John Darrill* the father is living, and has in all seven sons; they further find the entry of the defendant *George Darrill*, and that he levied a fine and suffered a recovery; and by an indenture for that purpose, he made particular settlement upon this marriage, and that he had two children by his wife; that he was under the age of 18, at the death of *Arthur* the brother of the testator, and that he was educated in the popish religion, and never took the oaths, nor subscribed the declaration, and that he was a papist; that the testator was a papist; that his brother *Arthur* was a papist; that the sisters, lessors of the plaintiff are papists, two of them nuns professed; that the other two had taken the benefit of legacies left them by this will: they find likewise the ages of the five other sons of *John* [150]

*Darrill*, the father, viz. *John Darrill*, born in 1704, who is a papist, *James*, in 1706, a papist, *Nathanael*, in 1709, a papist, *Thomas*, in 1711, a papist, and *Josiah*, born in 1713, whose religion is not found. Then they find that the lessors entered and demised to the plaintiff, and that the defendant entered upon and ousted him; but whether the defendant is guilty of a trespass, they submit it to the judgment of the court.

The question is, whether the defendant *George Darrill*, second son of *John Darrill*, takes any thing by virtue of this will, or whether the premises in question, are not vested in the heirs at law of the testator.

Mr. serjeant *Chapple*, for the plaintiff argued, that the defendant could take nothing; for that tho' he were intitled to any thing by the words of the devise, yet he is disabled by 11 and 12 *W. 3. c. 4. sect. 4.* by reason of his being a papist, as it is found in the verdict.

In that act there is a clause which begins in this manner. *That after the 29th of September, 1700, if any person educated in the popish religion or professing the same, shall not, within six months, after he or she shall attain to the age of eighteen years, take the oaths of allegiance and supremacy, and subscribe the declaration, &c. every such person shall in respect of him or herself only, and not to, or in respect of his or her heirs or posterity, be disabled and made incapable to inherit or take by descent, devise or limitation, in possession, reversion or remainder, any lands, tenements, &c. and that during the life of such person, or till he or she do take the said oaths &c., the next relation, being a protestant, shall have and enjoy the said lands, &c.* That this part of the clause has been determined to relate to devises, &c. made before the statute.

Then follows the remaining part of the clause in these general words. *That after the 10th of April, 1700, every papist &c. shall be disabled, and is hereby made incapable to purchase either in his or her own name, or in the name of any other person or persons, to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, &c. and that all and singular estates, terms, and any other interests, or profits whatsoever, out of lands, after the said tenth of April to be made, suffered or done, to or for the use or behoof of any such person, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person, shall be utterly void and of none effect, &c.* [151]

That they found themselves upon this latter part of the clause; that here being no reference to any particular manner of conveyance, the disabling is general and extends to purchases of all kinds made to persons within this act. The word *purchase* is a known term in the law, and signifies any estate not cast upon a man by act of law. 1 *Inst.* 18.

That this devise will come within that clause as it is found to be made in 1703, which is subsequent to the act. Secondly, that tho' the defendant were not disabled by act of parliament, yet he could not take under this devise. The words he claims under are the limitation to the first and eldest son of *John Darrill*, not heir at law to his father, which are wholly uncertain and therefore void. The father is found to be living, and therefore can have no heir at law at present, and the eldest son is exempt from that description; for *nemo est hæres viventis*.

*Hob.* 29. The father devised that all his lands should descend to his son, and if his son died without issue then to the next heirs male of his own name. The son died without issue male; the testator's brother entered; the daughters of the son brought

an ejectment, as heirs at law to the testator, and the devise was held void; for that the brother was not heir to the testator, since he had grand-daughters by his son.

Mr. serjeant *Eyre* for the defendant argued, that whatever the defendant's title may be, the lessors of the plaintiff must show a title in themselves, otherwise they cannot recover. Now the legal estate is conveyed by virtue of his will to the trustees, the lands being devised to them; to hold to them to the use of them and their heirs and assigns for ever. The testator's intention of creating a trust, appears likewise more plainly from the last words of the will, viz. *And also my will and mind is, that in case my personal estate, shall not extend to the payment of my just debts, legacies and funeral expences, that then my trustees shall, by rents, profits, mortgages, &c. levy and raise such sums of money as shall suffice for that purpose*, which it could not be in the trustees' power to do, unless the legal estate was vested in them. 2 *Vent.* 311. 1 *Vern.* 415. Words less strong than the present have been adjudged to make a trust in a will.

The consequence of this is, that the trustees who have the legal estate in them, not being lessors of the plaintiff, the plaintiff cannot recover.

As to the objection that the defendant is not so particularly described by the words of this devise, as to take by them; the words are sufficiently certain, as to the second son, since it is said, *the eldest, that shall not be heir at law to his father*, and then goes on to the third and fourth son. And it is afterwards said that if *John Darrill* the father dies having only one son, then remainder over, &c.

[152] Tho' in strictness of law no one can be called heir to his father, in his father's life time; yet the eldest son is usually so called. *Bract. lib. 2. 85. Fitz. Abr.*

Instance of a son being called heir in his father's life time.

254 *Hilary Term 8 Geo. 2. B. R.*

140. pl. 327. A writ of ravishment of ward *quare filium hæredem abduxit*, the writ was challenged, because the son could not be heir, as his father was living; *sed non Allocat.* 2 *Lev.* 232.

That tho' the description should not be good, as to the second son, there can be no doubt, as to the subsequent limitations, since they are expressly declared to the third, fourth, fifth, and every other son, whereas the father has five, and the youngest, *Josiah*, is not found by the verdict to be a roman catholic.

That 1 *Jac.* 1. c. 4. has much the same disabling words, as the clause 11 and 12 *W.* 3. and yet as to that act, it was determined that a person was only disabled as to himself, but that he might take for the benefit of his heirs. *Thornby and Fleetwood*, 10 *Mod.* 356. *Stran.* 318. originally commenced in *C. B.* then in *B. R.* where the court was divided, then carried up to the house of lords, where, upon hearing all the judges of *England*, it was determined, that the defendant, who was a popish gentleman educated abroad, should take for the benefit of his posterity.

In that case, Mr. Justice *Powis* cited the case of *Pye and Gorge* in chancery, 1709, where lord *Cowper* held, that upon the first part of the clause of this statute 11 and 12 *W.* 3. the freehold was in *Pye*, tho' he was not intitled to the profits.\*

That as it did not appear that the youngest brother had not conformed, it could not be presumed. Therefore it is submitted that the defendant is intitled to take for the benefit of his heirs, and tho' he should not, yet at least, some of his brothers may take, and tho' none of them could take; yet the lessors of the plaintiff have no title.

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\* Probably 1 *P. Will.* 128, although this point does not appear there.

Mr. serjeant *Chapple* in reply argued, that the limitation is to the trustees, to the use of them and their heirs, to a further use, that if the defendant is not capable, then it will be a resulting trust to the heirs at law, till the next in limitation is capable of taking; but what the plaintiff depends upon is the last part of the clause, which is not after the manner of the first, 1 *Yac.* 1. c. 4. But here a purchase stands singly by itself, and he is absolutely excluded in that case, to take either for the benefit of himself or posterity.

That the limitation to the third and fourth son, &c. is no better a description, since it is afterwards said that he shall not be heir at law to his father. The distinction is, that when an estate vests by descent, it may divest again, but where it vests by purchase it can never divest again, 1 *Co.* 95, 3 *Co.* 61. and therefore the intent of the testator would be disappointed, if either of the sons that take should afterwards come to be heirs at law to his father.

*Hardwicke*, Ch. Just. said, he would give no direct opinion, but break the case.

[153] As to the defendant's title two points have been made, first, that the limitation made by the will is not a good limitation, for that the description is so uncertain, that the defendant cannot take by it. The second, that supposing the first point to be with the defendant, yet he cannot take, as being disabled by 11 and 12 *W.* 3. c. 4.

The first objection seems to have some weight, but it is worthy of consideration, whether the limitation can be reduced to a certainty; for if the intention of the testator can be found out, the court is obliged to follow it. It seems a natural construction of the words, that he intended the second son should take, provided he did not enjoy his father's estate, and the



proceeding directly to the third son, bears with it a very strong implication, that this was his mind, as does also the proviso that he should not be heir at law to his father. It seems therefore, that this first limitation may be made certain to the second son, but if it cannot, if the description of the third son, &c. is certain, it is equally strong and conclusive to the lessors of the plaintiff, the third, fourth and fifth sons are all first, certainly described, and the only thing that can create the least doubt, is the subsequent proviso; and it does not seem that the third son &c. are in any manner within that: so that, as at present advised, I think this limitation seems to be sufficiently certain.

Then as to the second question, the case of *Roper and Radcliffe* 9 *Mod.* 167. has put an end to that, in which case it was solemnly determined, by the house of lords, that the word *purchase* in this statute, did comprehend a devise. The construction they made upon this clause of the act was, that all future limitations and devises were within this latter part of the clause, and that a devise being a purchase in strictness of law, a person disabled by that clause, was disabled to take by devise.

As to the relation which this bears to the 1 *Jac.* 1. c. 4. there is no such clause in that act, as what it depended upon in the present case.

These are the objections to the title of the defendant, but let that be what it will, the lessors of the plaintiff must recover upon their own strength, and if no title is shewn for them they cannot recover.

The great doubt, as to their title is this, whether the devise creates a use or a trust, to the sons of *John Darrill*, and I am clearly of opinion, that this is only to the use of the trustees, and that they have the

legal estate, and whoever else takes under this devise, takes only as *cestui que trust*.

In answer to this, it has been said, that this being a trust for a papist, the estate is made void by the act of parliament. As to this point, it is to be observed, that this is not only a trust for the defendant, but likewise for the other sons of *John Darrill*, the youngest of whom is not found by the verdict to be disabled to take.

[154] It has been the construction of this act, that if a trust is for a papist, not only the trust, but the legal estate likewise is void, though in the hands of protestants; but then the question is, whether this must not be understood, where the whole trust is for the use of papists; and I am at present of opinion, that where there is a remaining part of the trust to the use of protestants, the legal estate yet remains in the trustees for that purpose.

The case of *Carrick and Errington*, 9 *Mod.* 33. 2 *Peer. Wms.* 361. came in question in *Chancery*, upon this point. A man makes a settlement of his estate upon trustees, to the use of the trustees and their heirs, in trust to *A.* for life, remainder to the trustees to preserve contingent remainders, with remainder to the first and every other son of *A.* in tail; remainder to *B.* for life; remainder to the sons of *B.* in tail. The testator died. *A.* the first taker was a papist, but *B.* was a protestant, who brings his bill in *Chancery* for the profits of the estate, and makes the heir at law one of the defendants, suggesting that the limitation to *A.* was void, he being a papist; and as he had no child, and the next limitation was to him, it was a trust for him; but the lord chancellor *Macclesfield*, and afterwards lord *King*, upon a rehearing, were of opinion, that the

trust to *A.* was void, but that the legal estate settled in the trustees still remained good ; they being trustees not only for a papist, but likewise for a protestant ; and they held that trustees for preserving contingent remainders, being not only to let the tenant for life receive the profits, but also to make entries, and do all things for the preservation of the estate, for persons not yet in *esse*, the legal estate was good, in order to preserve those remainders, since the next taker, *viz.* the son of *A.* not being yet in *esse*, it did not appear that he would not be a protestant ; and they held that the heir at law was intitled to receive the profits in the mean time, during the life of *A.* till the next remainder could take effect. Afterwards, upon appeal to the *House of Lords*, this decree was affirmed.

This is a very strong case to shew that the heirs at law are not entitled to the legal estate, and that the trust being not only for the defendant, but also for any other son of *John Darrill*, the youngest of them not being found by the verdict to be disabled, and there yet remaining a possibility that *John Darrill*, the father, found to be yet living, may have more children, the legal estate remains in the trustees, in trust for those sons.

The consequence of this is, that the lessors of the plaintiff have mistaken their remedy, for instead of bringing this ejectment, they should have applied to *Chancery*, in order to have got the profits from the trustees, and as at present advised, it seems that they cannot recover in this ejectment.

*Cur.* ordered it to stand over.\*

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\* No further report of this case appears. The Stat. 11 and 12 *Will.* 3. c. 4. is repealed by 18 *Geo.* 3. c. 60, so far as relates to the disability of Papists to inherit lands by descent.

[155]

EASTER TERM.

8 GEORGII 2. IN B. R.

Rex v. Wheeler. Ca. temp. Hard.

99. S.C.



**M**R. *Fenwicke*, to shew cause why a *Mandamus* should not go to the defendant, as register of the *Consistory Court* of *Durham*, to deliver up all the public books, records and entries, to one *Trotter*. It came out on affidavit, that *Trotter* had a grant of this office, jointly with one *Hilton*, from the late lord bishop of *Durham*; and that *Trotter* survived *Hilton*, and by deed poll, the seventh of *August*, 1731, he made the defendant his deputy for three years, which expired on the seventh of *September* last, and that was the ground of *Trotter*'s application for this *Mandamus*; but it appears now upon affidavits, that the parties entered into an agreement, in writing under their hands, but not sealed, for *Wheeler*'s being their deputy for three years more, and that *Wheeler* has brought a bill in equity for the specific performance thereof, which is now depending in chancery, and is to be heard next term. He said these writs are not *ex debito justitiæ*, but at the discretion of the court; and he admitted a case cited by Mr. *Parker* upon the motion, where a *Mandamus* was granted in the like case to the register of the bishop of *Hereford*, but that it appeared in that case, that the office had been recovered in an assise; and besides, this can have no determination on a *Mandamus*, and *Trotter* might have applied to the bishop's court.

*Mandamus* granted only to prevent a failure of justice, &c.

Mr. *Strange*, for the *Mandamus*, cites 1 *Sid.* 31. pl. 7. A *Mandamus* to the town clerk of *Nottingham*, to deliver books, &c. to his successor. The *King* and *Powel*, *Mich.* 12 *Geo.* 1. *Mandamus* to a former mayor to deliver records to the succeeding mayor. The *King* and *Wildman*, *Mich.* 4 *Geo.* 2. *Stran.* 879. *Mandamus* to the clerk of the *Blacksmith's Company*, to deliver the company books to his successor.

Lord *Hardwicke*. The only material thing that has been said for this *Mandamus* is, that *Trotter* appearing to be the legal officer, is entitled to this *Mandamus, ex debito justitiæ*; but I do not see that [156] every officer that is rightfully the officer, though he has been disseised, is entitled to it *ex debito justitiæ*. The reason why we grant these writs, is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the king's charter, and as a private remedy to the party, except on the statute of queen *Anne*;\* and that stands on another footing. Nay, the old cases went so far as to refuse a *Mandamus* in all cases where an assise lay; and though the court is not so strict now-a-days, yet it shews in what light these writs are considered now. Here there does not appear to be any failure of justice, but only a dispute about a private right. If you say this is a disseisin, you may bring an assise. In the case of *Vincent*, a *Mandamus* was prayed to oblige the bishop to grant a license for preaching, to a lecturer, and the court did not enter into the question, whether that were a proper instance of granting a *Mandamus*, but refused it, because a dispute was then depending whether *Vincent* was intitled to the lectureship.

*Lee*, Just. The having a legal right to this office,

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\* *Quere*, 9 *Anne* c. 20.

gives no title to the books; for if *Wheeler* has an equitable right, it will bar the legal title, so that in this case, it cannot be said that *Trotter* is entitled to the books *ex debito justitiæ*.

*Cur.* discharged the rule.

*Parishes of Chesham in Bucks v. Stepney in Middlesex. Ca. temp. Hard. 100. S.C.*

**M***R. Draper* moved to quash an order for removing one *Jackson*, and his wife and children, from *Chesham* to *Stepney*. He objects, that the justices stile themselves in the order, *justices for the county aforesaid*, which is quite uncertain; for that both *Middlesex* and *Bucks* had been mentioned in the preceding part of the order, so that it does not appear whether they were justices for *Bucks*, which they ought to be; but it is quite uncertain. Secondly, That the adjudgment of the order is not direct, but by way of recital; *Whereas complaint has been made to us, justices for the county aforesaid. And we do adjudge, &c.*

Order quashed  
for uncertainty.

*Mr. Pilsworth, contra.* As to the second objection, he submits it upon the words of the order, that it is a plain adjudication; and as to the first objection, he says, that unless the court will presume that this order was made by the justices of *Middlesex*, it must be, of necessity, those of *Bucks*; and the court will not presume they are *Middlesex* justices, but the contrary; because what has been done could only be done by justices of *Bucks*; and to that purpose he cites a case of the parishes of *Horsham* and *Hensfield*. *Pasc. 5 Geo. 1.* where it was uncertain, upon the words of the order, which was the parish that made the complaint, but the court held that it must be intended

[157] to have been made by the parish which was aggrieved,

and where the paupers were resident, and from whence they were removed.

*Lord Hardwicke.* As to the second objection, Tho' the style of the order is a little incorrect; yet we should not be too strict in such cases, and the word *adjudge* being in this order, it is sufficient. But, as to the first objection, it has not been answered; and I think it is absolutely uncertain to which county the word *above-said* refers: if to the county last before mentioned, that is *Middlesex*, and they have no jurisdiction; for the power is only given to the justices of the peace from whence the person is removed, and this court can intend nothing in this case, but must take the order as it appears, and it not appearing to be by the justices of *Bucks*, it is a bad order. Nor is this case like that quoted by Mr. *Pilsworth*; for if that was a complaint by both parishes, it was but of the more weight; or if the other parishes joined in the complaint, it shall not prejudice the complaint of the parish which ought to complain, and did so.

Rule to quash the order made absolute.

*Gordon v. Halpen and his Wife.*

*Ca. temp. Hard. 101. S.C.*

Wife not allowed to plead separately from her husband.

**M**R. *Kettleby* moves, that the wife may have leave to plead separately from her husband. Her estate is settled upon her, which settlement is confirmed by a decree in the *House of Lords*, to be for her separate maintenance, only her estate is made liable to answer all actions brought against the husband on her account; and this is a fictitious demand in the plaintiff, set up by the connivance of the husband, and that he will let judgment go by default, and so share with the plaintiff what shall be recovered.

*Hardwicke, Ch. Just.* We cannot allow you to sever in pleading: your best way will be to plead in the name of husband and wife; and if the husband should disavow, and that be contrary to the order of the *House of Lords*, you will know how to enforce that order; but we can do nothing in it.

*Arglis v. Heafeman. Ca. temp.*  
*Hard. 101. S.C.*

**M**R. *Marsh* moved to quash an order of sessions made for discharging an apprentice. First exception; this is an original application to the sessions, whereas they have no original jurisdiction; their jurisdiction in these cases, arises from statute 5 *Eliz. c. 4. s. 35.* and in *Carth. 198.* the *King and Gately*, an order quashed for going originally to the sessions; which case is also in 5 *Mod. 138.* Second exception. If the sessions have an original jurisdiction; yet it is limited upon the appearance of the master, or some default made by him, which ought to be shewn in the order, and nothing of that appears on this order.

[158] Third exception: The jurisdiction in this case is not rightly exercised; for the reason they give, and they are bound to give a reason, is for *unkind usage* from the master. Now the act gives them jurisdiction, if the master *misuse* his apprentice, or *evil intreat* him; and the alleging unkind usage comes not up to that; and the order says further, that the master refuses to continue him in his service, or to entertain him according to the indentures, which will not make it better; for in the case of *King and Davie, Trin. 12 Geo. 1. Stran. 704.* an order stated, that the master declared he would not take his apprentice again, and held to be no sufficient reason; and the order was quashed.

Order for discharging an apprentice must set out the appearance of the master.



Mr. *Pilsworth*, *contra*. As to the first objection, there have been several resolutions contrary to that of the *King* and *Gately*, and particularly in the case of the *King* and *Johnson*, 2 *Salk.* 491. it was solemnly settled that the sessions have original jurisdiction, notwithstanding the words of the act. As to the second objection, he cited the case of *Dillan*, 1 *Salk.* 67. and *Ditton's* case, 2 *Salk.* 490. but on looking into them they appear to be directly against him. And in the case of *Ditton*, it is said that the act must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy. As to the third objection he says, that the act leaves it to the justices' discretion to discharge, if they see cause.

Lord *Hardwicke*. As to the first objection, the later cases have been, that the sessions have original jurisdiction; and though it were to be wished that private justices had a prior jurisdiction, as being less expensive; yet I think it is a right determination upon that act, that the sessions have an original jurisdiction; for the application which the act directs to be made to a private justice, seems to mean only to arbitrate and accomodate the dispute. The statute says, if he cannot compound the matter, he is to take bond for the party's appearance at the sessions, so that they are not to take it up by appeal. As to the second objection, I think it is not to be got over. In cases of convictions, appearance has always been held necessary, but in cases of orders in general, the court, in many cases, will presume *omnia rite esse acta*; and that distinctions between orders and convictions, was confirmed in the case of *King* and *Lloyd*, in last term, reported *ante* p. 142, *this edit.*; but then that presumption is only in cases of orders upon statutes, which do not in express terms, require an appearance: but now we are

upon an act which gives the justices an authority to proceed upon the appearance of the party, so that it is made an essential requisite by the act to found their jurisdiction. As to the third objection, in general, it is not necessary to set out the reason of their judgment, but here the act requires it : and it is rightly said, that *using unkindly* is not such misusage as is intended by the act ; and if the following reason, his refusing to continue him in his service, is to be understood as an absolute refusal to let him continue with him, and not only as a refusal to entertain him according to his articles, that neither will be a ground for this order, because the justices have a power to compel the master to take him again, as was done in the case of the *King* and *Davie*. However, this is more doubtful, but on the second objection, the order must be quashed.

[159]

*Rex v. the Inhabitants of All-Saints and St. Mary. Ca. temp. Hard. 105. S.C.*

**T**HESE parishes were indicted for not repairing the highway, and have demurred to the indictment.

*Mr. Marsh*, in behalf of the parishes, takes several exceptions to the indictment. First exception, the names of the grand jurors are not set out. *2 Roll. Abr. 82.* and *2 Keb. 470, ca. 61.* but the indictment being read it appears their names are set out. Second exception, that the indictment is not sufficiently certain in setting out the length and breadth of the road ; for it says only, containing by estimation about 16 acres in length, without mentioning the breadth. *2 Roll. Abr. 81. pl. 4.* Third exception, that there are three parishes jointly indicted, tho' it is a separate

Things necessary to be set out in an indictment for not repairing the high-ways.

offence. *Style 157.* Fourth exception, that it don't appear that these parishes are bound to these repairs; for it don't appear, that the road is in any of the parishes; nor is there a sufficient prescription laid to charge them otherwise; it being only said they have *been used and accustomed* to repair, and not said, *for time beyond memory.*

*Lord Hardwicke.* I don't see upon this last exception, how this indictment can be maintained. The parishes are an ecclesiastical division; yet they are of common right bound to repair the roads, and therefore 'tis sufficient to shew that a way lies within such a parish, and is out of repair, and to pray process against the inhabitants. Now here it appears, that this highway is within the liberty of *Derby*, but it don't appear that the three parishes are within the liberty of *Derby*; it is only said they are within *Derby*; and even if these words did sufficiently shew that, yet it would not then appear, that they are all within the liberty, so as to make them a vill: and if that appeared too, it should be shewn likewise, by what means they are chargeable. But it don't appear upon this indictment, that any part of this road is within the parish, so that it is bad upon this exception.

*Lee, Just.* I am of the same opinion, and I should think too, that the indictment is bad upon the second exception, for if the breadth don't appear, how can the court set a proper fine?

All agreed, that it is bad on the last exception.  
Judgment for the defendants.

[160] *Rex v. Neal. Ca. temp. Hard. 106. S. C.*

**I**NFORMATION in the nature of a *quo warranto* against the defendant, for exercising the office of master of the Coopers company. It sets forth that there is a company of coopers, and that the master thereof is an officer of public trust, and that defendant took upon him to execute the office, &c.

Information for exercising the office of master of the cooper's company; because admitted to be a public office of trust.

Defendant has demurred to the information, and there is a joinder in demurrer.

Mr. *Bootle*, for defendant, has only this exception, that this is not such a public office; for which a *quo warranto* lies.

Lord *Hardwicke*. But how can we allow of that exception now; since the information lays it to be a public office of trust, which you have confessed by your demurrer.

*Stock and Huggins v. Smith. Ca. temp. Hard. 106. S. C.*

**M**R. *Marsh* to shew cause, why an attachment should not issue against the defendant for not performing an award, which is made a rule of this court. He says they have liberty by the statute 9 and 10 *W. 3. c. 15.* which institutes this summary way of enforcing awards, to complain of any undue practice in making the award, at any time within the next term after it is made; and in this case one of the arbitrators was not summoned, nor the defendant *Smith*, one of the parties.

Court will not grant an attachment for non-performance of an award, if the plaintiff has brought his action upon it.

Mr. *Parker* with him argued, that where an award appears to be unreasonable, tho' an action of debt may be brought upon it, yet the court will not grant

an attachment, as was determined in the case of *Wil-mot* and *Allen*, *Pasch. 4 Geo. 2. 1 Barnard. 461*. Now here the arbitrators have charged us with the value of the goods, when we acted only as factors: He says likewise, and produces an affidavit thereof, that the plaintiff has made his election in suing out an action of debt, and is not therefore intitled to an attachment.

*Mr. Kettleby contra.* As to the action of debt which is brought, he says, 'tis as reasonable to grant an attachment notwithstanding, as the several remedies which are allowed upon mortgages, such as a bill for foreclosure, an action upon the bond, and an ejectment to get the possession; which are allowed to be all made use of at once. He cites *1 Salk. 73. ca. 12.* pending an attachment for non-performance of an award, an action of debt was sued, and the court was moved that he might not proceed both ways. And it was likened to the case where the court stays actions on attornies bills, while the matter is under reference before the master; but the court denied the motion, and took this diversity, that where they [161] relieve the party, by way of amends in a summary way, as in the instance put, it is reasonable, but otherwise in the case then in question, where the plaintiff has no satisfaction upon the attachment. He also cites *Richardson* and *Chancey*, *Mich. 1730, 1 Barnard. 386.* where plaintiff had judgment in an action of debt upon an award. And the regularity of the judgment being under reference to the master, an attachment was applied for; and granted, notwithstanding this objection. However, when the judgment was reported regular, they stopp'd the attachment.

*Lord Hardwicke.* I am satisfied you ought not to have an attachment, while an action is pending; and this is not like the several remedies allowed on mort-

gages; for they are for different purposes, as the ejectment, to gain the possession of the land, the action on the bond, to recover the money, and the bill is for foreclosing the equity of redemption. They are all remedies which the party is intitled to by course of law, and need not the leave of the courts. Now in this case there are two remedies, one by action to which you are intitled by course of law, but the other depends upon the discretion of the court, and both are for the very same purpose, *viz.* for the money awarded; for the court will not deliver the party from an attachment till he has paid the money, and the cases cited are agreeable to this doctrine, for in *Richardson* and *Chancey*, during the stay of his judgment he had lost the fruit of his action, so in the case in *Salk*. 73. No action was depending, when the attachment was granted, tho' in that case I should have thought it considerable, whether when he had got bail to his action, the court should not have stopt the attachment; but however, the attachment there, was granted before any action brought.

The rule must be discharged.

*Kempton on demise of Boyfield v. Crofs.*  
*Ca. temp. Hard. 108. S. C.*

**I**N ejectment for the rectory of the parish church of *Wandsworth*, tried at the last assizes for *Surry*, plaintiff made title under a term of years from the administrator of *Edward Salkway*, with the will annexed; but he did not produce in evidence the letters of administration themselves, only an exemplification thereof under the archbishop's seal, which was in this manner, "*To all christian people to whom &c. greeting, know ye, that having searched our registers and*

Exemplification of the act of court for granting an administration with the will annexed is sufficient evidence to prove the title of the administrator.

acts, &c. we have discovered, that on the day of a power was issued to to administer the goods of deceased, according to his will, because no executor thereof was appointed, the tenor of which will here be as follows [setting out the will verbatim.] Given under our archiepiscopal seal, &c." Which the judge of assize, Mr. justice *Reeve*, allowed as good evidence. A defence was made by the defendant, and a verdict for the plaintiff. And now Mr. *Lacy* for defendant moves for a new trial, and [162] objects, first, that the certificate or exemplification, was not sufficient to prove the administration, but that the book wherein those acts were register'd ought to have been produced, as in *Garrett v. Lister*, 1 *Lev.* 25, and *S. C.* in 1 *Keb.* 15. and in *Peaslee's Case*, 1 *Lev.* 101 and *S. C.* 1 *Keb.* 509, whereas this is only a recital of an administration in an exemplification of a will. The second objection is, that the affidavit on which they moved against the casual ejector was upon the late act of parliament, that so much rent was behind and no distress on the premises, but when they came to trial, they deserted that pretence, and set up another title, which misled us, who were come to make defence on the footing of their affidavit.

Lord *Hardwicke*. The granting administration is the act of the ecclesiastical court, who are the proper judges; the proof of that act is by the administration itself, (which can only be denied by denying the seal,) or by a copy of the acts of court, or by an exemplification thereof; so in the court of chancery and this court, exemplifications under seal are sufficient evidence; as being under the seal of the court, and not like a certificate made by an officer. Now this exemplification does not exactly correspond with the form of exemplifications in this court; for here we set out the record *in hæc verba*; and this is only a

recital of the fact, but however it imports an *inspeximus*, so that I think it will depend on their manner of exemplifying, for if this is their form, I should think, in substance, 'tis well enough.

As to the other matter, 'tis a matter of irregularity, and it seems to me to be so, but I doubt you have waived it by making a defence at the trial; for if there had been an irregularity in serving the ejectment or the notice of trial, the making defence would have cured it.

*Page*, Just. Doubts if the act intended to bar the plaintiff of making any other title; but suppose it does, yet this is waived by your defence.

*Probyn*, Just. Doubts, whether, when you have brought this ejectment upon this act of parliament, the defendant need come prepared to make any other defence; for this is a particular sort of ejectment; but then you should have made no defence.

*Lee*, Just. I don't see but, notwithstanding the directions of the act, the plaintiff may insist on any other title; but if he does, then he has not made a regular service for such an ejectment, but then your making defence waives all that; so that I think this should be a motion for irregularity rather than a new trial. The other matter must depend on the practice of the ecclesiastical court; the cases certainly are that producing the books with the entry is sufficient without shewing the letters of administration, and this instrument purports an *inspeximus*, and has the credit of the office seal.

*Cur.* Mention it again and get some of the registers from *Doctor's-Commons* to attend.

[163] Accordingly, at another day, several persons from *Doctor's-Commons* did attend, and were ask'd, and declared, that the custom was always in the prerogative



court, in exemplifications of general administration, to set out the letters of administration *in hæc verba*; but in case of special administrations, as administrations with the will annexed like this, they recite the entries in their books, and set out the will *verbatim*; and their affidavits to the same purpose were ready; and they produced two exemplifications with the will annex'd, upon the executor's renouncing, which were also in the same form, and one was dated in 1729, and the other in 1732. But Mr. *Rushworth*, who was register of the court of arches says, their way is to set out *verbatim* whatever is exemplified; but he says they seldom or never have special administrations, and very few others.

So the court thought the evidence was properly allowed at the assizes, and therefore would not grant a new trial.

**Denham-Parish v. Dalham-Parish in  
Suffolk. Ca. temp. Hard. 110. S. C.**

A person may gain a settlement in an extra parochial place; but it must consist of so many houses as may make it a sort of township or vill, where parish officers may be appointed.

**A**N order was made for the removal of one *Walker* and his wife from the parish of *Dalham*, to the parish of *Denham* in *Suffolk*, which was confirmed by the sessions; and the case appears upon the order to be, that *Walker* hired a farm in the parish of *Denham*, and paid all rates during his continuance there, which was from the year 1725 to the year 1730, and that he afterwards hired a farm of £150 *per annum*, in a place called *Southwood-Park*, which is an extra parochial place, consisting of two houses and 300 acres of land, and has no officers for the poor; and the justices adjudged, that he could not be removed to that place,

and so remove him to the parish of *Denham*, as the place of his last legal settlement.

Mr. *Strange* moved to quash these orders in behalf of the parish of *Denham*; for that it was determined in the case of *Stoke-lane and Dolting*, *Hil. 11 Ann, Fortescue* 219. that by virtue of the statute of 13 and 14 *Car. 2. c. 12. sect. 21.* the justices may exercise the powers of removal given by the 43 *Eliz. c. 2.* in all extra-parochial places containing more houses than one; and the same determination was in the case of the *King and Inhabitants of Rufford*, *Pasc. 8 Geo. 1. Stran.* 512. & 8 *Mod.* 39. *S. C.*

Mr. *Abney*, in support of the orders, argued, that in the case of *Stoke-lane and Dolting*, he allows the court did so determine; but not absolutely in all extra-parochial places consisting of more houses than one; but with this restriction, so as to come under the denomination of a vill, or township; and in the case of the inhabitants of *Rufford*, the *Mandamus* called it a vill, and they returned it to be an extra-parochial place, which return was held bad; because, said the court, there may be 500 houses. He cites a case of the *King and Inhabitants of Belvoir*, 2 *Sessions Ca.*

[164] 111. *ca.* 105. where it was stated that the extra parochial place had two houses, the duke of *Rutland's* seat, and an ale-house, and the order was quashed as not being a vill.

Mr. *Filmer*, with him, said the definition of a town or vill, according to *Finch*, p. 80, is containing ten families: according to 1 *Mod.* 78. it is where there is a tithing man or constable; and according to the 1 *Inst.* 115 *b.* *Villa est ex pluribus mansionibus vicinata, et collata ex pluribus vicinis.*

Lord *Hardwicke*. Before the case of *Stoke-lane and Dolting*, 'twas generally taken, that no settlement

could be gained in an extra-parochial place ; but in that case the court were all of opinion, that the clause in the statute of *Car. 2.* might extend to give the justices a power to appoint officers in extra-parochial places, provided 'twere such a place as could come under the notion of a vill. That construction seems to be a pretty liberal construction of the statute ; for upon reading the clause, it appears to extend only to such vills as are parts of large parishes ; but however, the court then thought extra-parochial places within the equity of it, and I believe my lord *Parker* meant by extra-parochial, places consisting of more houses than one ; but he added likewise, so as to come under the notion of a vill. So that his meaning was such places as were vills, and I can't see we can call this place a township, or a vill, nor do I know how it can be precisely settled what is a vill, but must be left to the court upon the circumstances of every case ; and therefore as this place don't appear to be a vill, I should think the order is right.

*Page, Just.* If this had been a decayed vill, it should be so stated specially.

*Probyn, Just.* The least division that I remember to be known in law is a tithing, which consists of ten houses or families ; and how can we understand a vill to be less than that. I think it should rather be understood to be between a tithing and a township. The statute of *Car. 2.* at first, related only to the northern counties, and was extended afterwards to other large counties, as being within the same equity.

*Lee, Just.* It is now generally settled, that justices may appoint overseers in extra-parochial places, but that is always on this foundation, that the place must be a town or a vill. The notion of a vill, or a tithing, is a place consisting of ten families as a civil division, and as having a constable. Now here I should not

think it necessary upon the statute to be confined to either description ; but then it ought to be a place at least that has the reputation of a vill. Here is only two houses, so that as it don't appear upon the order, I don't see how we can construe this to be a vill within the statute.

*Per Cur.* The order is good ; so the rule was discharged.

[165] *Rex v. Francis et al. Stran. 1015. and  
Ca. temp. Hard. 113.*

THIS case was first argued in *Mich. 8. Geo. 2.* Indictment against the six defendants for robbing one *Cox* in the high road, putting him in fear, was tried at *Wells in Somersetshire*, before Ch. baron *Reynolds*, at summer assizes, 1732, who ordered a special verdict to be found ; which was thus as to the material parts. The jury do say upon their oaths, that the said *Samuel Cox*, travelling on horseback, on the king's highway, to *Somerton-Fair*, in the said county of *Somerset*, on a place called *King's-down-Hill*, in the said county, and upon the day, &c. saw the said *Francis*, &c. in company together ; one of whom was then lying on the ground ; and that the said *Samuel Cox* then and there passed by them ; and that one of them (but which the jury do not know,) called him the said *Samuel Cox*, and desired him to change him half a crown, that they might give something to a poor *Scotchman*, meaning one of them, then and there lying on the ground ; that *Samuel Cox* came back, and then and there put his hand into his pocket, and pulled out some pieces of gold, viz. four moidores and a *Portugal* piece of gold, value three pound twelve. That the said *Cox* having

To make a complete robbery there must be a taking from the person and putting in fear ; but it is not necessary that the fear should be previous to the taking ; for if it accompanies it, it is sufficient. The words *then and there immediately* held not to exclude all mesne acts. In special verdicts it must be expressly found that the party robbed, was present at the taking up.

these pieces of gold, then and there in his hand, one of them, viz. *John Francis*, then and there gently struck his, the said *Cox's* hand, by means of which stroke, the said pieces of gold, then and there fell on the ground. That thereupon *Cox* got from his horse; and then and there said to *John Francis*, &c. that he would not lose his money so; and then and there offering to take up the said pieces of gold then and there in his presence, the said *John Francis*, &c. then and there swore, if he touched the said pieces of gold, they would knock his brains out; whereby the said *Samuel Cox*, was then and there put in bodily fear of his life; and then and there desisted from taking up the said pieces of gold. And the jurors upon their oaths, further say, that the said *John Francis*, &c. then and there immediately, took up the said pieces of gold, and got on their horses, and rode off with the said pieces of gold; and that *Cox* thereupon, immediately pursued them, and rode after them, for about half a mile. *Francis*, &c. struck him and his horse; and swore if he pursued them any further, they would kill him.

Mr. *Hussey* for the prosecutor argued, that these facts, as found in the special verdict, amount to robbery, according to the definition of it, as given in the books. For in *Hales Pl. Cor.* 532. 'tis said that robbery is a felonious and violent taking away from the person of another, money or goods, to any value, putting him in fear. And tho' the indictment runs *a persona*, yet 'tis not necessary that it be taken from his person; for if it be taken in his presence, 'tis sufficient, 3 *Inst.* 69. If a man seeking to escape, [166] for the safe-guard of his money, casts it into a bush, which the thief perceiving, takes it; this is a taking in law from the person. So is *Hawk. Pl. Cor. Robbery*, Bk. 1. Ch. 19. f. 5. where many

instances of this nature are put. *Ha. Pl. Co.* 533. *S. P.* Now here the verdict finds, that *Cox* got off his horse, in order to take up the money; but that being threatened by them, he desisted, for fear of his life; and that the defendants then and there immediately rode off with the money; so that it appears the money was in his presence, and under his care and protection, when they took it away. And further, as to *Cox's* being put in fear, I own it is necessary that the party be put in fear, either before the taking, or at the time of the taking. *Hawk. Pl. Co. Robbery, Bk. 1. Ch. 19. s. 6.* And here it is found, that after the money was gently struck out of his hand, he got off his horse to take it up; and then *Francis* and the rest swore, if he touched it, they would murder him; whereby *Cox* was put in bodily fear of his life, and desisted from taking it up; and that they took it up: so that the taking from him the money was not completed, till they took up the money from the ground: and before that time it is expressly found, that *Cox* was put in bodily fear of his life: so that here was a plain taking the money in his presence, putting him in fear.—One assaulted another on the highway, with an intent to rob him. The man resisted, and was too hard for the rogue; upon which he ran away; and in the scuffle exchanged his own hat, which was the best of the two, for the man's hat: and this at *Exeter* assize, was by *Eyre Ch. Just.* held to be robbery. *This was the substance of his argument;* excepting that he said that this was at least done in *fraudem legis*; and therefore, on a special verdict, the court will construe it a robbery. But the *Ch. Just.* said there was no pretence for that, because the court can't presume fraud; and therefore, in such cases, the jury always expressly find it to be done fraudu-

lently. *Kel.* 43, 4, 82. But it is not found here that the defendants did this *in fraudem legis*, or with an intent to commit a robbery on *Cox*, and therefore the defendants must be found guilty of robbery, on the facts set forth, or be entirely acquitted.

Mr. *Pratt*, for the defendants, said, that from the description of robbery, it is plain the person must be put in fear. And then he considered this verdict, and said, that here *Cox* was not put in fear; for that they civilly asked him to come back, and change half a crown; and that though one of them did strike the money out of his hand, yet it was done gently; and that the fear ought to be prior to a man's parting with his money: for it is absurd to say a man parted with his money for fear, which fear came after the time he had parted with it. And that here, when *Cox* had parted with his money, and it lay on the ground, there was nothing done to put him in fear; nor was he in fear when he got off his horse; for then he would never have told six men, he would not lose his money so. He owned the next words [167] did look something like a robbery: but, however, by the jury's finding, that when he offered to take up the money, they threatened to knock out his brains, by which he was then put in bodily fear; it appears plainly that he was not put in fear before that time; and though the jury find that *Cox* was put in fear, when he offered to take up the money; yet they do not say that he was in fear, when the money was actually taken from him; and it appears that he was not in fear, when they rode off with the money, for then he would not have followed them as he did, for near half a mile. But it is not found that this money was taken away in his presence; for though it is found, that when he desisted, the money was in his presence; yet the

following words, that they then and there immediately took it up, do not necessarily import, that the money was in his presence; for the word *then* is of an uncertain signification, and may mean only the same day. Here has been no case cited in point; and this is like the case of *Harman*, 2 *Rol. rep.* 154. which was rather stronger than the present case, for there was an artifice, *viz.* of getting money changed. There *Harman* threatened the prosecutor: so the defendants did *Cox*; and both of them were made to resist; and that was held to be no robbery. The case lately tried, before Mr. Just. *Lee*, was this. A rogue upon *Salisbury Downs*, drew his pistol upon a man, and offered to shoot him, if he did not deliver his money, upon which he threw all the money he had down upon the ground, and rode off; and, being in a great fright, he did not look back, till he was got off at some distance; and then he looked back, and saw the man still on horseback; upon which he rode off, and never saw the man off his horse; but left him setting on horseback over the money: and Mr. Just. *Lee* was of opinion that the robbery was not proved.

Ch. Just. That was a matter of evidence, which the jury must consider.

*Lee*, Just. I was of that opinion, because I thought it ought to be proved, that the prisoner had the possession of the money, which in that case the witnesses could not swear to.

Mr. *Pratt*. 'Tis the taking away a thing from a man's person against his will, which makes it robbery; and the jury have not found here, that the money was taken away from *Cox* against his will.

Ch. Just. To make a compleat robbery, there must be a taking from the person, putting him in fear. So the question is, whether all these circumstances



are found in this verdict. The taking away the money is expressly found; but it must be taken from him, putting him in fear. So it is to be considered, whether in this case, *Cox* was put in fear at the time of taking it away: and it is sufficiently found that at the time of taking away the money, *Cox* was put in fear; for 'tis not necessary that the person should be put in fear previous to the taking; [168] but if it accompanies it, 'tis sufficient. Now I think that in this case, when the defendants struck the money, tho' gently, out of *Cox's* hand, that was the inception, and beginning only of the taking; and that the taking was not compleat till the defendants took the money up from the ground; by which act, the taking was compleated. And before that fact 'tis expressly found, that *Cox* was put in bodily fear of his life, by their threatening to knock out his brains, by which he desisted from taking the money up. So that here was fear accompanying the act of taking the money away: for till the last taking, the money must be considered to be in *Cox's* possession. Now, as to the other circumstance of taking from his person, 'tis certain, that it is not absolutely necessary, that it must be taken from his person in the strictness of the word; for if it be taken in his presence, 'tis in legal understanding taken from his person. So is it held in the case of a man's casting his purse into a bush. *Hales Pl. Co.* 533. So likewise in *Salk.* 671, it was held that if *A.* is driving cattle on the highway, and one comes and takes them from him, it is robbery, which cannot be without a taking from his person. But the great doubt with me is, whether in this verdict, there is sufficient found, for us to adjudge that this money was taken away when *Cox* was present: for if he was not present, it cannot be

a robbery. And if he was present, according to the above cases, it will be a taking from his person, so as to make it a robbery. Now, as to that, the verdict finds sufficiently certain, that *Cox* was present when the money lay on the ground; and then it goes on thus, *viz.* and the jurors, upon their oath, further say, that the said *John Francis, &c.* then and there immediately took up the said pieces of gold, &c. Now this last finding is a distinct clause from the former, and the word *then* is of an uncertain signification; and is often made use of, to signify the same day: so the doubt with me is, whether these words must be understood to denote the same instant of time; for then, by necessary intendment, *Cox* must be present; or whether it may be understood to comprehend any greater space of time; for then the finding will not amount to the same as an express finding, that it was taken away in his presence. The word *immediately* does indeed seem to connect the time more closely; but the nice distinction which the court has always allowed of, in matters of blood, makes me very doubtful. 'Tis not necessary that the taking be found to be against one's will; for that is no definition of robbery, and the word *violenter* imports it. Nor is it necessary to be found, tho' it be laid in the indictment. And so is it held in the case of putting the words *fear of death* in an indictment. And this case, I think, is very distinguishable from *Harman's* case; for that was a taking *clam* and *secrete*; the party not being put in any fear, till the taking was completed. *Dy. 224. b. Pl. 30.*

[169] *Page, Just.* Thought there was no occasion for any construction or intendment in this case; for tho' the words *then and there* might have made it doubtful; yet the word *immediately*, must be taken to be of the

same sense, with the word *instantly*; and then the taking must be in *Cox's* presence. As to the rest, he was of the same opinion with the Ch. Justice.

*Probyn* and *Lee* Just. Were of the same opinion with *Page*, that the words then and there immediately seem so closely to connect the time of the striking the money out of his hand, &c. and there taking it away, that it must be understood to be a taking the money away in his presence: and as to the rest, they were of the same opinion with the Ch. Justice; who, after they had done speaking, said, that it would be material as to this point, to consider, whether the taking away the money, began from their striking out of his hand: for if so, then the whole must be considered but as one act; and at the striking it out of his hand, 'tis plain he must be present; and it is expressly found, that he was likewise present after that time.

*Cur.* Ordered it to be argued again.

This case was argued again, in *Hil. 8 Geo. 2.* When Mr. serjeant *Chapple, pro rege*, spoke much to the same effect with what was insisted on at the last argument.

Mr. *Strange contra.* Allowed that the taking from the presence of a man was, in the eye of the law, a taking from the person, so as to constitute it a robbery, if accompanied with fear; but that the presence of a man is not by any means to be presumed: and that if the presumption *stat indifferenter* whether the party was present or not, the presumption ought to turn in favour of the prisoners. So is the case of *Rex* and *Keat.* 5 *Mod.* 288. and *Skin.* 666. Now in this case, it is not said in the verdict, in what manner *Cox* desisted from taking up the pieces of gold; so that for ought appears, he might desist, by riding off, or stepping aside out of the way: and then the words

then and there immediately took up, &c. must be presumed only to mean and point out, what was the next thing done by the prisoners; and not to shew what length and distance of time it was, between Cox's desisting, and the prisoners' taking up the money. And the word *immediately*, if considered in opposition to *mediately*, makes the case more clear; for by the word *mediately*, it is to be understood that there was a mesne act done. So the word *immediately* must be taken to signify, that there was no mesne act done; but 'tis plain, the word *immediately* does not in this verdict carry the same sense, with the words *eo instante*: for it is said that Cox thereupon, immediately pursued them, and rode after them. Now 'tis to be intended from the wording of the verdict, that Cox was got off his horse, when the prisoners took up the money, and rode off; and yet it is not found that he mounted his horse, and then immediately rode after them: so that notwithstanding this

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word *immediately* here inserted, it must be plain, there must be some interval of time allowed him for getting on his horse. Besides, the word *immediately*, in *Littleton's* dictionary, signifies *forthwith*, or *by and by*, and when the writs are issued returnable *immediately*, it is never understood that the writ is to be returned that instant; but as soon as it reasonably may. So that for any thing that appears, Cox might not be present, when the prisoners took up the money. And in *Staunf. P. C.* 27. *Hales Pl. Cor.* 533. *Hawk. Pl. Cor. Robbery Bk. 1. Ch.* 19, s. 5. *Styles Rep.* 156, 'tis said that the taking must be openly, and before his face; and it appears by the case of *Rex and Huggins, Strange*, 882. and *Ld. Raym.* 1574. S.C., that when there is but a bare possibility of the contrary, his presence shall not be presumed: for in that case,

which was an indictment against him, for the murder of his prisoner *Arne*, 'twas there found by the special verdict, that *Huggins* was one present in the prison, and saw *Arne*, &c. & *ad tunc ibidem* turned away, and that *Barnes eodem tempore*, that *Huggins* turned away, locked the door upon *Arne*; and there being but a bare possibility to the contrary, the court would not presume that *Huggins* saw *Barnes* shut the door. It was likewise there found that *Huggins* saw *Arne sub duritiâ imprisonamenti illius*; yet the court would not presume that *Huggins* knew *Arne* to be *sub duritiâ*, &c. the fact not being expressly found. So neither in this case has the verdict expressly found, all the facts, which constitute a robbery. *Kel.* 109. All the judges held that they were confined to what the jury have found positively; and are not to judge the law, upon evidence of a fact, but upon the fact, as it is found. *Plummer's* case, and in the same book 79, is the like point adjudged; so likewise in pag. 66, wherefore upon these authorities it appears that the presence of *Cox* can't be presumed from any evidence of the fact; but that his presence ought to be found as an express fact.

*Cur.* Said nothing to it, but that they would have it argued again, before all the judges.

This case was accordingly argued before the twelve judges. And lord *Hardwicke* delivered their opinion in this term after this manner. All the judges but *Carter*, *Comyns* and *Thompson*, (who are doubtful only, and not clearly against it) are of opinion, that in this verdict, there is not sufficient found, for the court to adjudge the defendants to be guilty of robbery, *viz.* that it is an assault on the person of another, by putting him in fear, and taking from his person, his money or goods of any value whatsoever, as it ap-

pears in 3 *Inst.* 68. 1 *Ander.* 116. *H. Pl. Cor.* 532. *Staunf. P.C.* 27. and that the taking from his presence is in law a taking from his person; so is 3 *Inst.* 69. *H. Pl. Cor.* 533. But what taking shall be said to be in his presence, and what not, must arise on the circumstances of the case found by the jury. The uncertainty of this case, as found, is not in the striking of the money out of *Cox's* hand, but on the taking it from the ground; for the striking it gently out of [171] *Cox's* hand is certainly and positively found; but then it is not found *quo animo*, the money was struck out; so that it may be understood, that it was only a simple assault, or that it was done by accident. But if it had been found that it was struck out of his hand *animo furandi*; then, perhaps, upon this whole case, the fact might amount to robbery. But the next doubt arises on the words of the verdict, where *Cox* desisted from taking up the money; for it is not found in what manner *Cox* did desist, whether by going away, or by ceasing to take it up; so that this fact remains doubtful. And then comes the next part, which is a distinct finding of the jury. And there it is said, &c. which words *then and there immediately*, are relied on to connect the whole matter; and to make the finding necessarily to import that the money was taken away in the presence of *Cox*. But the words *then and there*, are certainly of too loose a signification for it, for they only import the same time, and place, in a general manner, in order to lay a venue, or such like. But then the word *immediately*, is strongly insisted on, as a word which excludes all mesne acts and time; and therefore, that this taking away the money must necessarily be in the presence of *Cox*. But all the nine judges held this word *immediately*, to be of so loose a signification, and

not to imply necessarily, that the money was taken away in *Cox's* presence. For this word does neither in its use and application, nor in its grammatical construction, exclude all mesne acts or time; nor in its legal signification, does it necessarily import it; for in *Stevens's Thesaurus*, (which is a book of the best authority) the word *immediatè*, is rendered by the words *cito* and *celeriter*. And *Cowper's Dictionary*, renders it by the words *by and by*, and by the words *sur le champ*, &c. But it is more necessary and proper in this case, to consider the signification of this word in the legal way. And it is plain, that in this acceptation, it is not understood to exclude mesne acts or time. Nor does the case in 2 *Lev.* 75. *Pybus* and *Misford*, prove that it ought to be so understood; but if well understood, it seems rather to imply the contrary, and to mean only a convenient time. So is 18 *Edw.* 4. *fo.* 21. *pl.* 31. This word has often been made use of in special verdicts. In *Oneby's* case, *Trin.* 13 *Geo.* 1. 2 *Strange* 766. it was made use of four or five times, and applied in different senses. And in *Mawgridge's* case, *Kel.* 119. this word is twice made use of, with words to explain it; and both times in different senses. For in the first place it is said, without any intermission; in the second place, it is explained by the words, in a little space of time. And on the statute *Hue and Cry*, 27 *Eliz.* c. 13. *f.* 11. where the words *with as much convenient speed as may be*, are made use of, all the precedents have expressed these words, by the word *immediatè*, as may be seen in the books. The last case which I shall mention on this point, is that of the writs of *Habeas Corpus*, issuing out of this court, which are most frequently made returnable *immediately*; and in this case the word is never un-

[172] derstood either to exclude mesne acts or time, but only means, with convenient speed. I think this is enough to shew the uncertain signification of this word *immediately*; and therefore we cannot think this to be a sufficient finding of the money being taken away in his presence; which is a fact which ought to be found by the jury, as it appears in *Plummer's* case, *Kel.* 109. Where the judges said that they were confined to what the jury had found positively; and were not to judge the law upon evidence of a fact, but on the fact as it is found. And so here the jury might well have found that this money was taken away in *Cox's* presence; and as they have not found it, we cannot adjudge upon this evidence of the fact, that it was actually taken away in his presence. And to the same purpose is *Kel.* 79. and *Rex* and *Huggins*, *M.* 4 *Geo.* 2. *Stran.* 882. and *Ld. Raym.* 1574. S.C. where lord *Raymond* said, it would be a most dangerous thing to give latitude to judges to presume facts from the evidence of facts set forth in special verdicts, in the case of life and death. Wherefore we are of opinion that there is not sufficient certainty found in this verdict to adjudge the prisoners to be guilty of this indictment; and therefore judgment must be given for the defendants. But then it is to be considered whether the defendants are to be discharged out of custody, or not; and we are all of opinion that they ought not to be discharged; because here is sufficient cause found in this verdict, to make the defendants guilty of grand larceny and felony. But still on this indictment, we cannot give judgment against them for grand larceny: for though in an indictment for burglary, and stealing goods out of a house, the defendant may be acquitted as to one part, and be convicted as to the other; and so in in-



dictments for felony by a statute, where the clergy is taken away, and for felony by the common law, the defendant may be acquitted of the felony by the statute, and be convicted of the felony at common law; yet this indictment is for taking away money *a personâ*; and the jury doubt of the truth of the charge of the felony and robbery, as set forth in the indictment; and as we have adjudged this charge not to be sufficiently grounded, the consequence is, that the defendants must be acquitted of it. But, however, as it appears by this finding of the jury, that they have been guilty of felony and grand larceny, they must be remanded; and may, by *Habeas Corpus*, be sent back again into *Somersetshire*, to be tried for this offence. And this case is different from the case of *Rex and Burridge, Mich. 8 Geo. 2. 2 Sess. Ca. 264. ca. 173.* where the defendant was absolutely discharged; because on that indictment and verdict, it did not appear the defendant was guilty of *any* felony. But here it appears plainly, the defendants have been guilty of grand larceny and felony.

N. B. These defendants were afterwards removed into *Somersetshire*, and at the next assizes were convicted of felony and grand larceny, and were ordered to be transported.



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